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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

VOL. 120,
CONTAINING CASES DECIDED AT THE MAY TERM, 1889, NOT
PUBLISHED IN VOL. 119.

INDIANAPOLIS:
THE BOWEN-MERRILL CO.
1890.

Entered according to the Act of Congress, in the year 1890,
By JOHN L. GRIFFITHS,
In the Office of the Librarian of Congress, at Washington, D. C.

Rec. Apr. 14, 1890.

PRINTED AND BOUND BY
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INDIANAPOLIS.

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TABLE OF THE CASES

REPORTED IN THIS VOLUME.

Adams, Kelley v.....	340	Brown, Boyd v.....	393
Adams Express Company v. Har-		Brown v. Marshall.....	323
ris.....	73	Brownstown and River Valley	
Anderson, City of, v. Bain.....	254	Gravel Road Company, State,	
Andis v. Richie.....	138	ex rel. Long, v.....	337
Asbury, Cleveland, Columbus,		Burk, Mason v.....	404
Cincinnati and Indianapolis R.		Bush v. City of Indianapolis.....	476
W. Co. v.....	289		
Ashton v. Shepherd.....	69	Cabel, McCracken v.....	266
Avery v. Indiana and Ohio Oil,		Caspar v. Jamison.....	58
Gas and Mining Co.....	600	Castor v. Davis.....	231
		Chestnut, Beem v.....	390
Babbs, Stewart v.....	568	Chittenden, Levy v.....	37
Bain, City of Anderson v.....	254	Cincinnati, Indianapolis, St.	
Ball, Wright v.....	134	Louis and Chicago R. R. Co. v.	
Baltimore, Ohio and Chicago R.		Cooper.....	469
R. Co., State v.....	298	Cincinnati, Wabash and Michi-	
Bannister, Crow v.....	600	gan R. W. Co., L'Hommedieu	
Banta, Peters v.....	416	v.....	435
Barger v. Hoover.....	193	City of Anderson v. Bain.....	254
Barlow v. State.....	56	City of Elkhart (State, ex rel.),	
Barnard v. Graham.....	135	Middleton v.....	166
Barr v. Vanalstine.....	590	City of Huntington v. Hawley..	502
Bartch, Holland v.....	46	City of Indianapolis, Bush v.....	476
Beardsley v. Marsteller.....	319	City of Indianapolis, Moore v.....	483
Beem v. Chestnut.....	390	Clark, Sunman v.....	142
Berry v. Town of Merom.....	161	Cleveland, Columbus, Cincinnati	
Bisch, Louisville and Nashville		and Indianapolis R. W. Co. v.	
R. R. Co. v.....	549	Asbury.....	289
Board of Commissioners of How-		Clare v. McIntire.....	262
ard County v. State, ex rel.		Colchen v. Ninde.....	88
Michener.....	282	Cole, Hartlep v.....	247
Board of Commissioners of Jay		Cole, Proctor v.....	102
County, Taylor v.....	121	Continental Insurance Co. v.	
Board of Commissioners of St.		Munns.....	30
Joseph County v. State, ex rel.		Cooper, Cincinnati, Indianapolis,	
Michener.....	442	St. Louis and Chicago R. R.	
Board of Commissioners of Wa-		Co. v.....	469
bash County v. Pearson.....	426	Cooper v. State.....	377
Bohr v. Neuenschwander.....	449	Cravens v. Eagle Cotton Mills	
Boyd v. Brown.....	393	Co.....	6
Brenner, Quick v.....	364	Cravens v. Eagle Cotton Mills	
Brinneman, State v.....	357	Co.....	600
Broughton, Leonard v.....	536	Cresswell, Patton v.....	147

Crow v. Bannister	600	Jackson v. Myers	504
Cunningham v. Jacobs	306	Jackson v. Smith	520
Davis, Castor v	231	Jacobs, Cunningham v	306
Dittmar, State v	54	Jamison, Caspar v	58
Dittmar, State v	388	Joseph v. Kronenberger	495
Dodge, Manhattan Cloak and Suit Company v	1	Jenkins, State v	268
Durham v. Smith	463	John, Hargrove v	285
Eagle Cotton Mills Co., Cravens v	6	Jolley, Giberson v	301
Eagle Cotton Mills Co., Cravens v	600	Jones, Purviance v	162
Essig v. Lower	239	Joyce, Stayner v	99
Fortman, Glatt v	384	Judy, Ohio and Mississippi R. W. Co. v	397
Fosher v. Guilliams	172	Kane, Louisville, New Albany and Chicago R. W. Co. v	140
Freed v. Mills	27	Kee, Lyon v	150
French, State v	229	Keifer, State, ex rel. Peter, v	113
Giberson v. Jolley	301	Kelley v. Adams	340
Glatt v. Fortman	384	Kennegar v. State	176
Graham, Barnard v	135	Kiley v. State	65
Graves v. Hinkle	157	Kilgore, Ex Parte	94
Green, Louisville, New Albany and Chicago R. W. Co. v	367	Kinncingham v. State	322
Green, Pickett v	584	Kronenberger, Joseph v	495
Greensboro and New Castle Junc- tion Turnpike Co. v. Stratton	294	Lamb, Wasson v	514
Guilliams, Fosher v	172	Langsdale v. Woollen	16
Hargrove v. John	285	Langsdale v. Woollen	78
Harper, State, ex rel. Hulman, v	23	Leach, State v	124
Harris, Adams Express Co. v	73	Leonard v. Broughton	536
Harrisburg Car Mfg. Co. v. Sloan	156	Levy v. Chittenden	37
Harrison v. Manship	43	L'Hommedieu v. Cincinnati, Wa- bash and Michigan R. W. Co.	435
Hart v. State, ex rel. Rock	83	Liggett v. Hinkley	387
Hartlep v. Cole	247	Louisville and Nashville R. R. Co. v. Bisch	549
Hawley, City of Huntington v	502	Louisville, New Albany and Chi- cago R. W. Co. v. Green	367
Hayes v. Sykes	180	Louisville, New Albany and Chi- cago R. W. Co. v. Kane	140
Heiman, Rollet v	511	Lower, Essig v	239
Hill v. Probst	528	Lucas v. Pennsylvania Co	205
Hinkle, Graves v	157	Lyon v. Kee	150
Hinkley, Liggett v	387	Manhattan Cloak and Suit Co. v. Dodge	1
Hogan, Staser v	207	Manship, Harrison v	43
Hogshead v. State, ex rel. Allen	327	Marshall, Brown v	323
Holland v. Barch	46	Marsteller, Beardsley v	319
Hoover, Barger v	193	Mason v. Burk	404
Hull v. State	153	McCracken v. Cabel	266
Huntington, City of, v. Hawley	502	McIntire, Clore v	262
Indiana and Ohio Oil, Gas and Mining Co., Avery v	600	Mendenhall, Prilliman v	279
Indiana and Ohio Oil, Gas and Mining Co., State, ex rel. Cor- win, v	575	Merom, Town of, Berry v	161
Indianapolis, City of, Bush v	476	Middleton v. State, ex rel. City of Elkhart	166
Indianapolis, City of, Moore v	483	Miller, Sites v	19
Jackson v. Myers	504	Mills, Freed v	27
Jackson v. Smith	520	Moore v. City of Indianapolis	483
Jacobs, Cunningham v	306	Moore, Sphung v	352
Jamison, Caspar v	58	Munns, Continental Insurance Co. v	30
Joseph v. Kronenberger	495		
Jenkins, State v	268		
John, Hargrove v	285		
Jolley, Giberson v	301		
Jones, Purviance v	162		
Joyce, Stayner v	99		
Judy, Ohio and Mississippi R. W. Co. v	397		
Kane, Louisville, New Albany and Chicago R. W. Co. v	140		
Kee, Lyon v	150		
Keifer, State, ex rel. Peter, v	113		
Kelley v. Adams	340		
Kennegar v. State	176		
Kiley v. State	65		
Kilgore, Ex Parte	94		
Kinncingham v. State	322		
Kronenberger, Joseph v	495		
Lamb, Wasson v	514		
Langsdale v. Woollen	16		
Langsdale v. Woollen	78		
Leach, State v	124		
Leonard v. Broughton	536		
Levy v. Chittenden	37		
L'Hommedieu v. Cincinnati, Wa- bash and Michigan R. W. Co.	435		
Liggett v. Hinkley	387		
Louisville and Nashville R. R. Co. v. Bisch	549		
Louisville, New Albany and Chi- cago R. W. Co. v. Green	367		
Louisville, New Albany and Chi- cago R. W. Co. v. Kane	140		
Lower, Essig v	239		
Lucas v. Pennsylvania Co	205		
Lyon v. Kee	150		
Manhattan Cloak and Suit Co. v. Dodge	1		
Manship, Harrison v	43		
Marshall, Brown v	323		
Marsteller, Beardsley v	319		
Mason v. Burk	404		
McCracken v. Cabel	266		
McIntire, Clore v	262		
Mendenhall, Prilliman v	279		
Merom, Town of, Berry v	161		
Middleton v. State, ex rel. City of Elkhart	166		
Miller, Sites v	19		
Mills, Freed v	27		
Moore v. City of Indianapolis	483		
Moore, Sphung v	352		
Munns, Continental Insurance Co. v	30		

TABLE OF CASES REPORTED.

v

Murphy v. State.....	115	State v. French.....	229
Myers, Jackson v.....	504	State v. Jenkins.....	268
Neuenschwander, Bohr v.....	449	State v. Leach.....	124
New Haven, Town of, Powers v.....	185	State, Barlow v.....	56
Newman, Traders Insurance Co. of Chicago v.....	554	State, Cooper v.....	377
Ninde, Colchen v.....	88	State, Hull v.....	153
Nixon v. Whitely, Fasler & Kel- ly Co.....	380	State, Kennegar v.....	176
Nowlin v. Whipple.....	596	State, Kiley v.....	65
Ohio and Mississippi R. W. Co. v. Judy.....	397	State, Kinningham v.....	322
Patterson, Westhafer v.....	459	State, Murphy v.....	115
Patton v. Cresswell.....	147	State, Qualter v.....	92
Pearson, Board of Commissioners of Wabash County v.....	426	State, Sage v.....	201
Peck v. Sims.....	345	State, Skinner v.....	127
Pennsylvania Co., Lucas v.....	205	State, Stropes v.....	562
Peters v. Banta.....	416	State, ex rel. Allen, Hogshead v.....	327
Peters, Tomlinson v.....	237	State, ex rel. City of Elkhart, Middleton v.....	166
Phoenix Insurance Co. of Brook- lyn v. Stark.....	444	State, ex rel. Corwin, v. Indiana and Ohio Oil, Gas and Mining Co.....	575
Pickett v. Green.....	584	State, ex rel. Holland, Works v.....	119
Powers v. Town of New Haven.....	185	State, ex rel. Hulman, v. Harper.....	23
Prilliman v. Mendenhall.....	279	State, ex rel. Long, v. Brownstown and River Valley Gravel Road Co.....	337
Probst, Hill v.....	528	State, ex rel. Michener, Board of Commissioners of Howard County v.....	282
Proctor v. Cole.....	102	State, ex rel. Michener, Board of Commissioners of St. Joseph County, v.....	442
Purviance v. Jones.....	162	State, ex rel. Peter, v. Keifer.....	113
Qualter v. State.....	92	State, ex rel. Rock, Hart v.....	83
Quick v. Brenner.....	364	State, ex rel. Shepard, v. Sulli- van.....	197
Richie, Andis v.....	138	Stayner v. Joyce.....	99
Rietman v. Stolte.....	314	Stein, Supreme Sitting Order of the Iron Hall v.....	270
Riggs v. Trees.....	402	Stewart v. Babbs.....	568
Rigler v. Rigler.....	431	Stolte, Rietman v.....	314
Robertson v. Robertson.....	333	Stratton, Greensboro and New Castle Junction Turnpike Co v.....	294
Rollet v. Heiman.....	511	Stropes v. State.....	562
Sage v. State.....	201	Sullivan, State, ex rel. Shepard, v.....	197
Shepherd, Ashton v.....	69	Sunman v. Clark.....	142
Sims, Peck v.....	345	Supreme Sitting Order of the Iron Hall v. Stein.....	270
Sites v. Miller.....	19	Sykes, Hayes v.....	180
Skinner v. State.....	127	Taylor v. Board of Commission- ers of Jay County.....	121
Sloan, Harrisburg Car Mfg. Co. v.....	156	Taylor v. Williams.....	414
Smith, Durham v.....	463	Tomlinson v. Peters.....	237
Smith, Jackson v.....	520	Town of Merom, Berry v.....	161
Sphung v. Moore.....	352	Town of New Haven, Powers v.....	185
Stark, Phoenix Insurance Co. of Brooklyn v.....	444	Traders Insurance Co. of Chica- go v. Newman.....	554
Staser v. Hogan.....	207	Trees, Riggs v.....	402
State v. Baltimore, Ohio and Chi- cago R. R. Co.....	298		
State v. Brinneman.....	357		
State v. Dittmar.....	54		
State v. Dittmar.....	388		

TABLE OF CASES REPORTED.

Vanalstine, Barr v.....	590	Williams, Taylor v.....	414
Wasson v. Lamb	514	Woollen, Langedale v.....	16
Westhafer v. Patterson	459	Woollen, Langedale v.....	78
Whipple, Nowlin v.....	596	Works v. State, ex rel. Hol-	
Whitely, Fasler & Kelly Co.,		land.....	119
Nixon v	360	Wright v. Ball.....	134

TABLE OF THE CASES

CITED IN THIS VOLUME.

Abbott v. Hampden Mut., etc., Ina Co., 30 Me. 414.....	559	Ayres v. Farmers, etc., Bank, 79 Mo. 421.....	518
Achey v. State, 64 Ind. 56.....	180	Bake v. Smiley, 84 Ind. 212	42
Adams v. Hackensack Improve- ment Commission, 44 N. J. Law, 638.....	386	Baker v. Ludlam, 118 Ind. 87.....	432
Adams v. Harrington, 114 Ind. 66.....	148	Baldwin v. Barrows, 86 Ind. 351..	302
Adams Express Co. v. Hill, 43 Ind. 157.....	77	Baldwin v. Fagan, 83 Ind. 447...	302
Addington v. Wilson, 5 Ind. 137..	467	Baldwin v. Franks, 120 U. S. 678..	579
Ætna Ins. Co. v. Kittles, 81 Ind. 96.....	342	Balfe v. Lammers, 109 Ind. 347..	526
Ætna Ins. Co. v. Wheeler, 49 N. Y. 616.....	76	Ball v. Balfe, 41 Ind. 221.....	215
Agricultural Ins. Co. v. Montague, 38 Mich. 548.....	560	Balliett v. Humphreys, 78 Ind. 388	90, 420
Allen v. Davis, 99 Ind. 216..363, 572		Ballinger v. Tarbell, 16 Iowa 491..	246
Allen v. Davis, 101 Ind. 187..364, 572		Baltimore, etc., R. R. Co. v. John- son, 84 Ind. 420	267
Allen v. Frazer, 85 Ind. 283.....	86	Baltimore, etc., R. R. Co. v. Krei- ger, 90 Ind. 380.....	90
Allen v. Jones, 47 Ind. 438.....	525	Baltimore, etc., R. R. Co. v. Row- an 104 Ind. 88.....	141
American Button-hole., etc., Co. v. Burlington, etc., Ass'n, 61 Iowa, 464....	595	Baltimore, etc., R. R. Co. v. Wightman, 29 Gratt. 431.....	265
Anderson v. Crist, 113 Ind. 65.....	336	Bancroft v. Merchants', etc., Co., 47 Iowa 262.....	76
Anderson v. Donnell, 66 Ind. 150..	457	Bannister v. Grassy Fork, etc., Ass'n, 52 Ind. 178	348
Anderson v. Kramer, 93 Ind. 170..	412	Barnard v. Brown, 112 Ind. 53....	26
Anderson v. State, 7 Ohio, 607.....	013	Barnes v. Webster, 16 Mo. 258...	312
Andrist v. Union Pacific R. W. Co., 30 Fed. Rep. 345.....	471	Barnett v. State, 100 Ind. 171.....	223
Applegate v. Doe, 2 Ind. 169.....	60	Bartlett v. Pittsburgh, etc., R. W. Co., 94 Ind. 281.....	77
Argo v. Barthand, 80 Ind. 63.....	523	Bartley v. Phillips. 114 Ind. 189..	430, 457
Atchison, etc., R. R. Co. v. Weber, 33 Kan. 543.....	473	Bates v. State, 31 Ind. 72	565
Atlantic., etc., R. R. Co. v. Reis- ner, 18 Kan. 458.....	473	Bayless v. Glenn, 72 Ind. 5.....	215
Atwood v. Caswell, 19 Pick. 493..	80	Beals v. Beals, 20 Ind. 163	331
Atwood v. Welton, 7 Conn. 66.....	133	Beck v. Pavey, 69 Ind. 304	458
Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315.....	562	Beckner v. Riverside, etc., Co., 65 Ind. 468.....	15
Avery v. Akins, 74 Ind. 283.....	441	Bedford, etc., R. R. Co. v. Rain- bolt, 99 Ind. 551.....	211
Ayers v. Lawrence, 59 N. Y. 192..	320	Beer Co. v. Massachusetts, 97 U. S. 25.....	492
Ayers v. Watson, 113 U. S. 594....	63	Behler v. Weyburn, 59 Ind. 143..	461

Beitman v. Hopkins, 109 Ind. 177.....224	Bristol Milling, etc., Co. v. Pro- basco, 64 Ind. 406.....195, 297
Bell v. State, 42 Ind. 335.....457	Brooks v. Allen, 62 Ind. 401.....100
Benner v. Benner, 10 Ind. 256.....388	Brown v. Goble, 97 Ind. 86.....245
Beshore v. Lytle, 114 Ind. 8.....336	Brown v. Russell, 105 Ind. 46.....572
Billman v. Indianapolis, etc., R. Co., 76 Ind. 166.....265, 472	Brown v. State, 7 S. E. Rep. 915..492
Blackmer v. Royal Ins. Co., 115 Ind. 291.....583	Brown v. Will, 103 Ind. 71....42, 364, 572
Blanchard v. Moulton, 63 Maine 434.....598	Brumfield v. Drook, 101 Ind. 190..342
Blodgett v. Bartlett, 50 Ga. 553..552	Bryan v. Uland, 101 Ind. 477.....173
Board, etc., v. Bacon, 96 Ind. 32..428	Bryson v. McCreary, 102 Ind. 1..493
Board, etc., v. Center Tp., 105 Ind. 422.....339	Buchanan v. State, ex rel., 106 Ind. 251.....509
Board, etc., v. Dombke, 94 Ind. 72.....427	Buchart v. Burger, 115 Ind. 123....433
Board, etc., v. Hall, 70 Ind. 469..533	Buck v. Axt, 85 Ind. 512.....349
Board, etc., v. Jameson, 86 Ind. 154.....85, 412	Bunch v. Grave, 111 Ind. 351.....595
Board, etc., v. Legg, 93 Ind. 523..264	Bunnell v. Bunnell, 93 Ind. 595..457
Board, etc., v. Legg, 110 Ind. 479..427	Bunnell v. Davisson, 85 Ind. 557.. 80
Board, etc., v. Leggett, 115 Ind. 544.....429	Buntin v. Rose, 16 Ind. 209.....292
Board, etc., v. Markle, 46 Ind. 96..309, 522	Buntin v. State, 68 Ind. 38.....270
Board, etc., v. Silvers, 22 Ind. 491.....526	Burkham v. Hayes, 116 Ind 136..183
Board, etc., v. State, ex rel., 103 Ind. 497.....283	Burns v. Fox, 113 Ind. 205..... 40
Board, etc., v. State, ex rel., 106 Ind. 270.....283	Burns v. Jenkins, 8 Ind. 417.....572
Board, etc., v. State, ex rel., 116 Ind. 329.....283	Burnside v. Lincoln County Court, 86 Ky. 423.....492
Boden v. Dill, 58 Ind. 273.....532	Burritt v. Saratoga, etc., Ins. Co., 5 Hill, 188..... 36
Boesker v. Pickett, 81 Ind. 554..160	Burroughs v. State, 72 Ind. 334..203
Bolton v. Richard, 6 Term, 139..517	Burrow v. Terre Haute, etc., R. Co., 107 Ind. 432.....349
Bondurant v. Bladen, 19 Ind. 160..363	Bush v. City of Indianapolis, 120 Ind. 476.....486
Bonsall v. Isett, 14 Iowa 309.....245	Butcher v. Stultz, 60 Ind. 170 72, 510
Bosseker v. Cramer, 18 Ind. 44..430, 457	Butler University v. Scoonover, 114 Ind. 381..... 15
Boulden v. McIntire, 119 Ind. 574.....235	Butterfield v. Beall, 3 Ind. 203...559
Bowen v. Pollard, 71 Ind. 177 ...266	Bybee v. State, 94 Ind. 443.... 300
Bowen v. Preston, 48 Ind. 367.....594	Caffrey v. Dudgeon, 38 Ind. 512..312
Bowers v. Snyder, 88 Ind. 302.....149	Calder v. Kurby, 5 Gray, 597....492
Bowles v. State, 13 Ind. 427566	Camden, etc., R. R. Co. v. For- syth, 61 Pa. St. 81..... 76
Bowman v. Phillips, 47 Ind. 341..220	Camden, etc., R. R. Co. v. Hosey, 99 Pa. St. 492.....552
Box v. Stanford, 13 S. & M. 93...510	Campbell v. Gould, 17 Ind. 133.. 28
Boyd v. Alabama, 94 U. S. 645...491	Campbell v. Kuhn, 45 Mich. 513..513
Boyd v. Peach Bottom R. W. Co., 90 Pa. St. 169..... 13	Campbell v. People, 34 Mich. 351..118
Brabston v. Gibson, 9 How. 263..386	Canal Co. v. Hill, 15 Wall. 94... 11
Bradley v. Snyder, 14 Ill. 263....593	Caress v. Foster, 62 Ind. 145..281, 510
Brannen v. Kokomo, etc., G. R. Co., 115 Ind. 115.....474	Carey v. State, ex rel., 34 Ind. 105.....115
Breckenridge v. Ormsby, 1 J. J. M. 236.....513	Cargar v. Fee, 119 Ind. 536.....185
Brenner v. Quick, 88 Ind. 546...364, 594	Carother's Appeal, 118 Pa. St. 468..577
	Carr v. Boone, 108 Ind. 241..... 22
	Carr v. Hays, 110 Ind. 408...10, 572, 588
	Carr v. McCampbell, 61 Ind. 97..348
	Carr v. State, ex rel., 81 Ind. 342.. 70
	Carrico v. Tarwater, 103 Ind. 86..245

TABLE OF CASES CITED.

ix

Carson v. McFarland, 2 Rawle, 118.....	321	City of Indianapolis v. Imberry, 17 Ind. 175.....	526
Carthage Turnpike Co. v. An- drews, 102 Ind. 138	398	City of Indianapolis v. Kings- bury, 101 Ind. 200	527
Carver v. Carver, 97 Ind. 497.....	80	City of Lafayette v. Allen, 81 Ind. 166	421
Carver v. Carver, 115 Ind. 539....	290	City of Lafayette v. Nagle, 113 Ind. 425	261
Carver v. Carver, 83 Ind. 368	457	City of North Vernon v. Voegler, 103 Ind. 314	428
Catterlin v. Armstrong, 101 Ind. 258	594	City of South Bend v. Hardy, 98 Ind. 577	220
Caylor v. Roe, 99 Ind. 1.....	510	City of Terre Haute v. Beach, 96 Ind. 143	245
Caywood v. Medsker, 84 Ind. 520....	173	Civil Rights Cases, 109 U. S. 3....	580
Chambers v. Butcher, 82 Ind. 508....	510	Clark v. Deutsch, 101 Ind. 491....	254
Chandler v. Monmouth Bank, 1 Green, 255	296	Clark v. Fisher, 19 Am. Dec. 402....	466
Chapell v. Shuee, 117 Ind. 481... ..	90, 420	Clark v. Manufacturers' Ins. Co., 8 How. 235.....	36
Cheaney v. Lafayette, etc., R. W. Co., 68 Ill. 570	296	Clark v. Reyburn, 8 Wall. 318	594
Chestnut Hill, etc., Co. v. Piper, 77 Pa. St. 432	599	Clark v. Wright, 67 Ind. 224.....	267
Chicago v. Sheldon, 9 Wall. 50... ..	11	Claybaugh v. Baltimore, etc., R. W. Co., 108 Ind. 262	454
Chicago, etc., R. R. Co. v. Bills, 118 Ind. 221.....	392	Clements v. Lee, 114 Ind. 397....	526
Chicago, etc., R. R. Co. v. Hedges, 105 Ind. 398.....	293	Cleveland, etc., R. W. Co. v New- ell, 104 Ind. 264.....	430
Chicago, etc., R. R. Co. v. Ostran- der, 116 Ind. 259	293	Cleveland, etc., R. W. Co. v. Wynant, 100 Ind. 160.....	49
Child v. Swain, 69 Ind. 230.....	40	Cline v. Lindsey, 110 Ind. 337....	468
Childs v. Childs, 10 Ohio St. 339....	594	Cliver v. State, 45 N. J. L. 46....	118
Chissom v. Barbour, 100 Ind. 1....	343	Clodfelter v. Hulett, 72 Ind. 137.....	572
Choen v. State, 85 Ind. 209.....	179	Coan v. Clow, 83 Ind. 417	19
Chouteau v. Burlando, 20 Mo. 482.....	461	Coan v. Grimes, 63 Ind. 21	18
Christian v. O'Neal, 46 Miss. 669....	245	Coe v. Errol, 116 U. S. 517	578
Chy Lung v. Freeman, 92 U. S. 275.....	579	Coffin v. Ransdell, 110 Ind. 417....	199
Cincinnati, etc., R. R. Co. v. Carper, 112 Ind. 26	551	Coffing v. Hardy, 86 Ind. 369.....	302
Cincinnati, etc., R. R. Co. v. Chester, 57 Ind. 297.....	49	Colchen v. Ninde, 120 Ind. 88....	420
Cincinnati, etc., R. R. Co. v. Heaston, 43 Ind. 172	342	Cole v. Butler, 43 Maine, 401....	246
Citizens', etc., Co. v. Town of El- wood, 114 Ind. 332.....	577	Colegrove v. New York, etc., R. R. Co., 20 N. Y. 492.....	206
City National Bank, etc., v. Burns, 68 Ala., 267	517	Coleman v. State, 111 Ind. 563....	222
City of Crawfordsville v. Irwin, 46 Ind. 438	349	Collins v. Nelson, 81 Ind. 75.....	500
City of Delphi v. Evans, 36 Ind. 90	526	Colt v. McConnell, 116 Ind. 249....	141
City of Elkhart v. Wickwire, 22 N. E. Rep. 342	523	Columbia Conduit Co. v. Com- monwealth, 90 Pa. St. 307	577
City of Evansville v. Page, 23 Ind. 525	63	Columbia Ins. Co. v. Lawrence, 2 Peters, 23	559
City of Evansville v. Pfisterer, 34 Ind. 36	191	Commonwealth v. Brennan, 103 Mass. 70	492
City of Frankfort v. Aughe, 114 Ind. 77	487	Commonwealth v. Roosnell, 143 Mass. 32.....	118
City of Indianapolis v. Gilmore, 30 Ind. 414.....	524	Commonwealth v. Slack, 19 Pick. 304.....	565
		Commonwealth v. Wolbert, 6 Binney, 292.....	170
		Commonwealth's Ins. Co. v. Mon- ninger, 18 Ind. 352.....	448
		Conant v. National State Bank, 22 N. E. Rep. 250.....	588

TABLE OF CASES CITED.

Conner v. Town of Marion, 112 Ind. 517	42	Dick v. Hitt, 82 Ind. 92.....	25
Continental Life Ins. Co. v. Kessler, 84 Ind. 310.....	448	Dickerson v. Board, etc., 6 Ind. 128.....	363
Converse v. Kellogg, 7 Barb. 590.....	447	Dickson v. McCoy, 39 N. Y. 400.....	265
Cooper v. State, 64 Md. 40.....	380	Dilks v. Hammond, 86 Ind. 563....	344
Copeland v. Copeland, 89 Ind. 29.....	183	Diven v. Johnson, 117 Ind. 512....	588
Coquillard v. Bearss, 21 Ind. 479..	85	Dixon v. People, 18 Mich. 84.....	235
Core v. Wilson, 40 Ind. 204.....	363	Dodge v. Gaylord, 53 Ind. 365....	395,
Corey v. Swagger, 74 Ind. 211.....	458		412
Corson v. Maryland, 120 U. S. 502.....	579	Dodge v. Kinzy, 101 Ind. 102.....	364, 573
Coryell v. Stone, 62 Ind. 307.....	215	Doe v. Bowen, 8 Ind. 197.....	82
Cottrell v. Shadley, 77 Ind. 348.....	457	Doe v. Brown, 5 Blackf. 309	559
County of Mobile v. Kimball, 102 U. S. 691.....	580	Doe v. Harvey, 3 Ind. 104.....	82
Covey v. Neff, 63 Ind. 391	331	Doe v. Naylor, 2 Blackf. 32.....	461
Cowdrey v. Hitchcock, 103 Ill. 262.....	175	Doepfner v. State, ex rel., 36 Ind. 111.....	115
Cowley v. Town of Rushville, 60 Ind. 327	487	Donellan v. Hardy, 57 Ind. 393..	90,
Cox v. Aetna Ins. Co., 29 Ind. 586.....	448		420
Coyner v. Boyd, 55 Ind. 166.....	458	Doss v. Missouri, etc., R. R. Co., 59 Mo. 27.....	471
Cragie v. Hadley, 99 N. Y. 131....	517	Doughterty v. Barnes, 64 Mo. 159.....	175
Cranch v. Martin, 3 Blackf. 256.....	457	Dow v. Gould & Curry, etc., Co., 31 Cal. 629.....	447
Crane v. Buchanan, 29 Ind. 570..	72	Downard v. Hadley, 116 Ind. 131..	3
Cranor v. State, 39 Ind. 64	269	Downey v. State, ex. rel., 77 Ind. 87.....	42
Crater v. Crater, 118 Ind. 521	561	Duesterberg v. State, ex rel., 116 Ind. 144	292
Cravens v. Eagle Cotton Mills Co., 120 Ind. 6.....	600	Dunlap v. Wagner, 85 Ind. 529.....	391,
Crooks v. Kennett, 111 Ind. 347.....	573		472
Cross v. Truesdale, 28 Ind. 44.....	331	Durbin v. Haines, 99 Ind. 463 ...	26
Cuddy v. Horn, 46 Mich. 596	206	Durham v. Bischof, 47 Ind. 211.....	331
Cummings v. Cheshire, etc., Ins. Co., 55 N. H. 457.....	32	Durham v. Fechheimer, 67 Ind. 35.....	40
Cupp v. Campbell, 103 Ind. 213.....	362,	Dutton v. Hobson, 7 Kan. 196.....	245
	573	Edwards v. Johnson, 105 Ind. 594.....	493
Cureton v. Mills, 13 S. C. 409.....	82	Edwards v. Ogle, 76 Ind. 802.....	356
Cuthrell v. Cuthrell, 101 Ind. 375.....	215	Egbert v. Rush, 7 Ind. 706.....	321
Daniel Ball, The, 10 Wall. 557.....	578	Eichelberger v. Old Nat'l Bank, 103 Ind. 401.....	302
Dark v. Johnston, 55 Pa. St. 164.....	599	Eighmie v. Taylor, 98 N. Y. 288..	11
Darrah v. Watson, 36 Iowa 116.....	245	Ellis v. Baker, 116 Ind. 408.....	362
Darrell v. Hilligoss, etc., G. R. Co., 90 Ind. 264.....	40	Ellis v. Council Bluffs Ins. Co., 64 Iowa, 507	33
Daugherty v. Rogers, 119 Ind. 254.....	11	Ellis v. State Ins. Co., 68 Iowa . 578.....	34
Davidson v. Koehler, 76 Ind. 398.....	336	Engler v. Acker, 106 Ind. 223.....	364,
Davis v. Krug, 95 Ind. 1	420		573
Davis v. Newman, 2 Rob. 664.....	321	Estee v. Knightstown, etc., Co., 41 Ind. 174	15
DeHaven v. Covalt, 83 Ind. 344.....	500	Evans v. Schafer, 86 Ind. 135.....	42
Deming v. State, ex rel., 23 Ind. 416.....	547	Evans v. Thornburg, 77 Ind. 106.....	500
Dennis v. Heath, 11 Smed. & M. 206.....	343	Evansville, etc., R. R. Co. v. Crist, 116 Ind. 446.....	472
Dennis v. Louisville, etc., R. W. Co., 116 Ind. 42.	375	Everson v. Seller, 105 Ind. 266....	223
Dequindre v. Williams, 31 Ind. 444.....	522	Ewing v. Ewing, 44 Mo. 23	175
Derry v. Derry, 98 Ind. 319.....	419	Farley v. Eller, 29 Ind. 322.....	73

TABLE OF CASES CITED.

xi

Farris v. Jones, 112 Ind. 498.....	419	Graham v. State, ex rel., 66 Ind. 386.....	430
Faurote v. State, ex rel., 110 Ind. 463	84, 87	Grant v. Westfall, 57 Ind. 121.....	215
Faust v. City of Huntington, 91 Ind. 493.....	527	Green v. Elliott, 86 Ind. 531...148, 457	
Fehrle v. Turner, 77 Ind. 530.....	423	Green v. Groves, 109 Ind. 519.....	510
Feibleman v. State, ex rel., 98 Ind. 516	480	Greencastle, etc., Turnpike Co. v. State, ex rel., 28 Ind. 382.....	480
Fell v. State, 42 Md. 71	492	Greenman v. Cohee, 61 Ind. 201- 85	
Fertilizing Co. v. Hyde Park, 97 U. S. 659.....	493	Greensborough v. Underhill, 12 Vt. 604.....	235
Field v. Malone, 102 Ind. 251.....	245	Greenup v. Crooks, 50 Ind. 410...224	
Filer v. New York, etc., R. R. Co., 59 N. Y. 351	551	Griffin v. State, ex rel., 119 Ind. 520.....	579
Flanagan v. Camden, etc., Ins. Co., 1 Dutch. 506.....	33	Grissom v. Moore, 106 Ind. 296...594	
Fleenor v. Driskill, 97 Ind. 27 ...	441	Grubb v. State, 117 Ind. 277...222, 382	
Fleenor v. Taggart, 116 Ind. 189...547		Gullett v. Miller, 106 Ind. 75.....	388
Fleetwood v. Dorsey Machine Co., 95 Ind. 491.....	157	Haas v. Shaw, 91 Ind. 384.....	160
Fleming v. Potter, 14 Ind. 486 ...	462	Hahn v. Kelly, 34 Cal. 391.....	246
Fletcher v. Holmes, 32 Ind. 497...593		Halliday v. St. Louis, etc., R. W. Co., 74 Mo. 159.....	76
Flinn v. Parsons, 60 Ind. 573.....	548	Hamrick v. Danville, etc., G. R. Co., 41 Ind. 170.....	424
Fogg v. Middlesex, etc., Ins. Co., 10 Cush. 337.....	33, 555	Hancock v. Fleming, 103 Ind. 533...183	
Foster v. Equitable, etc., Ins. Co., 2 Gray, 216	33	Hansher v. Hanshew, 94 Ind. 208.. 90	
Fowler v. Baltimore, etc., R. R. Co., 18 West Va. 579.....	551	Hanson v. Mansfield R. W., etc., Co., 38 La. Ann. 111.....	551
Fowler v. State, 85 Ind. 538.....	125	Harbaugh v. Albertson, 102 Ind. 69.....	313
Franklin, etc., Ins. Co., v. Drake, 2 B Mon. 47.....	558	Harper v. Norfolk, etc., R. R. Co., 36 Fed. Rep. 102.....	265
Freck v. Christian, 55 Ind. 320...458		Harris v. Hannibal, etc., R. R. Co., 89 Mo. 233.....	553
Freeman v. State, 119 Ind. 501... 67		Harris v. Harris, 8 Bradwell, 57-235	
Freshour v. Logansport, etc., Turnpike Co., 104 Ind. 463.....	238	Harris v. Insurance Co., 50 Pa. St. 341.....	558
Fryer v. Rockefeller, 63 N. Y. 268.....	461	Harvey v. Laffin, 2 Ind. 477.....	572
Gage v. Brewster, 31 N. Y. 218...595		Hatten v. Robinson, 4 Blackf. 479.. 72	
Gale v. Corey, 112 Ind. 39.....	337	Hatton v. Jones, 78 Ind. 466.....	398
Galena, etc., R. R. Co. v. Fay, 16 Ill. 558	553	Hawley v. Williams, 90 Ind. 160.. 49	
Gandolpho v. State, 33 Ind. 439...179		Hay v. State, ex rel., 58 Ind. 337.. 40	
Garfield v. State, 74 Ind. 60.....	223	Hayes v. Burkam, 67 Ind. 359 ...219	
Garrett v. Jackson, 20 Pa. St. 331...598		Haymond v. Saucer, 84 Ind. 3 .. 70	
Garrett v. State, 109 Ind. 527	382	Hays v. Mitchell, 7 Blackf. 117.. 45	
Gerber v. Friday, 87 Ind. 366.....	412	Hays v. People, 1 Hill, 351.....	118
Gerrard v. Johnson, 12 Ind. 636.. 82		Hays v. State, 8 Ind. 425.....	348
Gibson v. Chouteau, 45 Mo. 171...343		Heagy v. Black, 90 Ind. 534.....	148
Gilbert v. Hall, 115 Ind. 549.....	148	Heath v. West, 68 Ind. 548.....	11
Givens v. Commonwealth, 29 Grattan, 830.....	118	Hedge v. Sims, 29 Ind. 574.....	63
Glantz v. City of South Bend, 106 Ind. 305.....	422, 430	Helpenstine v. Vincennes Nat'l Bank, 65 Ind. 582.....	246
Glenn v. Porter, 49 Ind. 500.....	348	Henderson v. Dickey, 76 Ind. 264...421	
Goodwin v. Smith, 72 Ind. 113...303		Henderson v. Mayor, 92 U. S. 259...579	
Gordon v. Lee, 102 Ind. 125.....	594	Henderson v. State, ex rel., 58 Ind. 244	548
Gould v. Steyer, 75 Ind. 50.....	342	Hendrick v. Whittemore, 105 Mass. 23.....	246
Grable v. McCulloh, 27 Ind. 472...595		Henning v. State, 106 Ind. 386...222	
		Henry v. Rutland, etc., R. R. Co., 27 Vt. 435	296

Herbert v. Mechanics, etc., Ass'n, 90 Am. Dec. 601.....	546	Indianapolis, etc., R. W. Co. v. Bush, 101 Ind. 582.....	100, 422
Hibbitts v. Jack, 97 Ind. 570	412	Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291.....	471, 551
Hickey v. Boston, etc., R. R. Co., 14 Allen, 429.....	551	Indianapolis, etc., R. W. Co. v. Pitzer, 109 Ind. 179.....	180, 472
Higgins v. Carlton, 92 Am. Dec. 666.....	465	Indianapolis Sun Co. v. Horrell, 53 Ind. 527.....	77
Higgins v. Kendall, 73 Ind. 522..	70	Inhabitants v. Forrest, 1 Pen- nington 107.....	169
Higham v. Harris, 108 Ind. 246..	462	Insurance Co. v. Brim, 111 Ind. 281.....	583
Hill v. Hagaman, 84 Ind. 287.....	598	Insurance Co. v. Foley, 105 U. S. 350.....	383
Hill v. Winsor, 118 Mass. 251....	472	Insurance Co. v. Garland, 108 Ill. 220	34
Hilton v. Mason, 92 Ind. 157.....	532	Jackson v. King, 15 Am. Dec. 354.....	466
Hines v. Driver, 100 Ind. 315....	384	Jackson v. State, etc., 104 Ind. 516.....	244
Hobbs v. Board, etc., 116 Ind. 376	523	James, Ex Parte, 8 Vesey, jr., 337.....	3
Hoffman v. First Nat'l Bank, 46 N. J. L. 604.....	518	Jeffersonville, etc., R. R. Co. v. Hendricks, 41 Ind. 48.....	265
Hollcraft v. Douglass, 115 Ind. 139.....	548	Jeffersonville, etc., R. R. Co. v. Riley, 39 Ind. 568	398
Holmes v. Village of Hyde Park, 121 Ill. 128.....	526	Jenkins v. Lemonds, 29 Ind. 294..	115
Home Ins. Co. v. Duke, 75 Ind. 535.....	562	Jenkins v. Stetler, 118 Ind. 275...	191
Home Ins. Co. v. Howard, 111 Ind. 544.....	462	Jenney, etc., Co. v. Murphy, 115 Ind. 566	317
Hooper v. Hudson River, etc., Ins. Co., 17 N. Y. 424.....	33	Johns v. State, 104 Ind. 557.....	283
Hoot v. Spade, 20 Ind. 326.....	41	Johnson v. Allen, 62 Ind. 57.....	191
Hoover v. Sidener, 98 Ind. 290....	157	Johnson v. Culver, 116 Ind. 278..	373
Hopkins v. Stanley, 43 Ind. 553..	292	Johnson v. Harmon, 19 Iowa 56..	595
Hosford v. Johnson, 74 Ind. 479..	595	Johnson v. Moore, 112 Ind. 91....	343
House v. Alexander, 105 Ind. 109..	77	Johnson v. Murray, 112 Ind. 154..	548
Houston v. Bruner, 39 Ind. 376..	363	Johnson v. Putnam, 95 Ind. 57....	421
Hovey v. Chase, 83 Am. Dec. 514..	466	Johnson v. State, 116 Ind. 374 ...	523
Howard v. State, 87 Ind. 68..130,	565	Johnson v. Wabash, etc., Plank Road Co. 16 Ind. 389.....	14
Howell v. Zerbee, 26 Ind. 214....	349	Johnson v. Wiley, 74 Ind. 233.134,	220
Hubbard v. Marshall, 50 Wis. 322.....	588	Jolly v. Ghering, 40 Ind. 139.....	349
Hubble v. Wright, 23 Ind. 322....	461	Jones v. Baird, 76 Ind. 164..421,	430
Hughes v. State, 103 Ind. 344.....	58	Jones v. Carnahan, 63 Ind. 229 ..	548
Hulburt v. New York Central R. R. Co., 40 N. Y. 145	206	Jones v. Castor, 96 Ind. 307	412
Hull v. Rawls, 27 Miss. 471	235	Jones v. Ewing, 107 Ind. 313.364,	573
Hume v. Conduitt, 76 Ind. 598....	245	Jordan v. Corey, 2 Ind. 385.....	462
Hunter v. Fitz Maurice, 102 Ind. 449.....	425	Jordan v. Westerman, 62 Mich. 170.....	358
Hunter v. Pfeiffer, 108 Ind. 197..	286	Jouchert v. Johnson, 108 Ind. 436.....	574
Hutchins v. Johnson, 12 Conn. 376.....	344	Judd v. Small, 107 Ind. 398	40
Hutts v. Hutts, 62 Ind. 240.....	423	Junction R. R. Co. v. Harris, 9 Ind. 184	559
Iles v. Martin, 69 Ind. 114	96	Kain v. Smith, 80 N. Y. 458.....	206
Iles v. Watson, 76 Ind. 359	19, 70	Keller v. Boatman, 49 Ind. 104....	456
Indiana, etc. R. W. Co. v. Allen, 113 Ind. 581	524	Kelley v. Adams, 120 Ind. 340....	556
Indiana, etc., R. W. Co. v. Fin- nell, 116 Ind. 414.....	373, 430	Kelly v. Kelly, 9 Ala. 908.....	82
Indiana, etc., R. W. Co. v. Wheel- er, 115 Ind. 253.....	474		
Indiana Ins. Co. v. Brehm, 88 Ind. 578	344		

TABLE OF CASES CITED.

xiii

Kenworthy v. Williams , 5 Ind. 375.....467	Louisville, etc., R. W. Co. v. Ader , 110 Ind. 376..... 70
Kern v. Bridwell , 119 Ind. 226...222	Louisville, etc., R. W. Co. v. Buck , 116 Ind. 566264, 317
Ketcham v. Brazil, etc., Co. , 88 Ind. 515..... 11	Louisville, etc., R. R. Co. v. Crunk , 119 Ind. 542.....471
Kidd v. Pearson , 123 U. S. 1.....578	Louisville, etc., R. W. Co. v. Falvey , 104 Ind. 409430
Kinningham v. State , 119 Ind. 332.....322	Louisville, etc., R. W. Co. v. Frawley , 110 Ind. 18.....100, 317
Klein v. Laudman , 29 Mo. 259...235	Louisville, etc., R. R. Co. v. Kelly , 92 Ind. 371551
Knight v. Portland, etc., R. R. Co. , 56 Me. 234.....206	Louisville, etc., R. W. Co. v. Lucas , 119 Ind. 583205
Knight v. State , 84 Ind. 73.....269	Louisville, etc., R. W. Co. v. Peck , 99 Ind. 68..... 70
Knopf v. State , 84 Ind. 316..... 66	Louisville, etc., R. W. Co. v. Pedigo , 108 Ind. 481.....293
Koerner v. State , 98 Ind. 7...226, 395	Louisville, etc., R. W. Co. v. Phillips , 112 Ind. 59.....473
Kohl v. United States , 1 Otto, 367...581	Louisville, etc., R. R. Co. v. Sullivan , 81 Ky. 624.....473
Kopelke v. Kopelke , 112 Ind. 435-253	Louisville, etc., R. W. Co. v. Thompson , 107 Ind. 442...215, 428
Kreitline v. Franz , 106 Ind. 359-388	Louisville, etc., R. R. Co. v. Wolfe , 80 Ky. 82206
Krutz v. Howard , 70 Ind. 174....423	Louisville, etc., R. W. Co. v. Wood , 113 Ind. 544...265, 429, 472
Lafferty v. Jelley , 22 Ind. 471. ... 85	Louisville, etc., R. W. Co. v. Worley , 107 Ind. 320293
Lake Erie, etc., R. W. Co. v. Fix , 88 Ind. 381.....551	Lowder v. Lowder , 58 Ind. 538...466
Lake Ontario, etc., R. R. Co. v. Mason , 16 N. Y. 451 14	Lowry v. State, ex rel. , 64 Ind. 421.....331
Lake Shore, etc., R. R. Co. v. Brown , 123 Ill. 162551	Ludlow v. Ludlow , 109 Ind. 199... 70
Lake Shore, etc., R. W. Co. v. Stupak , 108 Ind. 1317	Luntz v. Greve , 102 Ind. 173441
Lamb v. Camden, etc., R. R. Co. , 46 N. Y. 271 76	Lutz v. City of Crawfordsville , 109 Ind. 466.....487
Lamb v. Lamb , 105 Ind. 456....214	Lyles v. Lescher , 108 Ind. 382... 11
Lamb v. Morris , 118 Ind. 179....517	Lyon v. Davis , 111 Ind. 384436
Lane v. Atlantic Works , 111 Mass. 136.....472	Macomber v. Nichols , 34 Mich. 212..... 52
Langdon v. Applegate , 5 Ind. 327...480	Madison, etc., Co. v. Stevens , 10 Ind. 1.....572
Langsdale v. Woollen , 99 Ind. 575..... 81	Magee v. Young , 40 Miss. 164...559
Lantz v. Maffett , 102 Ind. 23...19, 82	Maghee v. Camden, etc., R. R. Co. , 45 N. Y. 514 76
Lapping v. Duffy , 65 Ind. 229....546	Maguire v. Bissell , 119 Ind. 345... 63
Lary v. Goodnow , 48 N. H. 170...344	Mahan v. Sherman , 7 Blackf. 378.....572
Laverty v. State, ex rel. , 109 Ind. 217..... 90	Mains v. State , 42 Ind. 327.....129
Lawrence v. Commonwealth , 80 Grattan, 845118	Makepeace v. Lukens , 27 Ind. 435.....343
Lawson v. Hilgenberg , 77 Ind. 221.....42	Malone v. State , 14 Ind. 219.....130, 565
Leary v. New , 90 Ind. 502..... 18	Mansur v. Streight , 103 Ind. 358-204, 418
Leeds v. City of Richmond , 102 Ind. 372527	Marble v. State , 13 Ind. 362...130, 565
Leib v. Butterick , 68 Ind. 199.... 40	Marquand, In Re , 57 How. Pr. 477..... 3
Lemans v. Wiley , 92 Ind. 436.... 72	
Leonard v. Blair , 59 Ind. 510....342	
Lerch v. Emmett , 44 Ind. 331....224	
Levering v. Shockey , 100 Ind. 558.....588	
Lewis v. State , 113 Ind. 59.....155	
License Cases , 5 How. 504..... 98	
Livingston, In Re , 34 N. Y. 555... 493	
Longmore v. Great Western R. W. Co. , 19 C. B. N. S. 183206	

Marquette, etc., R. R. Co. v. Taft, 28 Mich. 289.....	473	McLain v. Matlock, 7 Ind. 525...154	
Marsh v. Low, 55 Ind. 271.....	157	McMahan v. Stewart, 23 Ind. 590-588	
Martin v. American Ex. Co., 19 Wis. 356.....	76	McMullen v. State ex rel., 105 Ind. 334.....	21
Martin v. Davis, 82 Ind. 38.....	556	McPherson v. Cox, 96 U. S. 404..	98
Martin v. State, 23 Neb. 371.....	492	Meiers v. State, 56 Ind. 336-269, 300	
Martindale v. Palmer, 52 Ind. 411.....	526	Mercer v. Corbin, 117 Ind. 450... 50	
Mastin v. Halley, 61 Mo. 196.....	461	Merchants', etc. Co. v. Bolles, 80 Ill. 473.....	76
Mathis v. Thomas, 101 Ind. 119..	77	Meredith v. Reed, 26 Ind. 334...265	
Mavity v. Eastridge, 67 Ind. 211-548		Mershon v. State, 51 Ind. 14.....179	
Maxwell v. Boyne, 36 Ind. 120...292		Metropolitan Board v. Barrie, 34 N. Y. 657.....	491
May v. Fletcher, 40 Ind. 575.....	593	Metropolitan National Bank v. Lloyd, 90 N. Y. 530.....	517
Mayor v. Second Ave. R. R. Co., 32 N. Y. 261.....	494	Michael v. Alestree, 2 Levinz, 172.....	265
Mayor, etc., v. Harrison, 30 N. J. 73.....	170	Michael v. Thomas, 27 Ind. 501-313	
Mays v. Hedges, 79 Ind. 288.....	461	Miles v. Vanhorn, 17 Ind. 245 ... 41	
McAlpine v. Sweetser, 76 Ind. 78-245		Miller v. Billingsly, 41 Ind. 489-331	
McArthur v. Carrie's Adm'r, 32 Ala. 75.....	598	Miller v. Evansville National Bank, 99 Ind. 272.....	18
McCardle v. Barricklow, 68 Ind. 356.....	598	Miller v. Goodwine, 29 Ind. 46...344	
McClaren v. Indianapolis, etc., R. R. Co., 83 Ind. 319.....	226, 395	Miller v. Noble, 86 Ind. 527.....441	
McClelland v. Louisville, etc., R. W. Co., 94 Ind. 276.....	473	Million v. Board, etc., 89 Ind. 5-245	
McClure v. Peoples', etc., R. W. Co., 90 Pa. St. 269.....	14	Minneapolis, etc., Co. v. Davis, 41 N. W. Rep. 1026.....	14
McCole v. Loehr, 79 Ind. 430.....	344	Mitchell v. Tomlinson, 91 Ind. 167.....	302
McComas v. State, 11 Mo. 116.....	118	Mok v. Detroit Building, etc., Ass'n, 30 Mich. 511.....	481
McCool v. State, 23 Ind. 127-269, 300		Montgomery v. Hickman, 62 Ind. 598.....	561
McCord v. Wright, 97 Ind. 34.....	595	Montgomery v. Tate, 12 Ind. 615-559	
McCormick v. Hunter, 50 Ind. 186.....	594	Montgomery v. Wasem, 116 Ind. 343.....	521
McCormick v. Webster, 89 Ind. 105.....	19, 245	Moore v. City of Indianapolis, 120 Ind. 483.....	483
McCormick, etc., Co. v. Gray, 100 Ind. 285.....	293	Moore v. Mayor, 4 Selden, 110 ...560	
McCormick, etc., Co. v. Gray, 114 Ind. 340.....	290, 436	Moore v. Read, 1 Blackf. 176.....457	
McCormick, etc., Co., v. Scovell, 111 Ind. 551.....	573	Moore v. State, 65 Ind. 213..... 67	
McCraney v. McCraney, 5 Iowa, 232.....	560	Moore v. State, ex rel., 71 Ind. 478.....	339
McCurdy v. Bowes, 88 Ind. 583-342		Morey v. Ball, 90 Ind. 450.....419	
McDonald v. Elfes, 61 Ind. 279-572		Morrison v. Jacoby, 114 Ind. 84-524	
McFadin v. David, 78 Ind. 445... 45		Morrow v. Weed, 4 Iowa, 77.....246	
McGill v. Bruner, 65 Ind. 421...526		Mugler v. Kansas, 123 U. S. 623-493	
McIlvaine v. Lantz, 100 Pa. St. 586.....	265	Mulcahey v. Givens, 115 Ind. 286.....	391
McKee v. Gould, 108 Ind. 107...239		Muncey v. Joest, 74 Ind. 409.....245	
McKinney v. State ex rel., 117 Ind. 26.....	332	Munn v. State, 94 U. S. 113.....580	
McKinney v. Town of Salem, 77 Ind. 213.....	491	Munroe v. Cooper, 5 Pick. 412...303	
McKinsey v. Bowman, 58 Ind. 88-458		Munson v. Blake, 101 Ind. 78...454	
McKone v. Michigan Central R. Co., 51 Mich. 601.....	206	Murch v. Concord, etc., R. R. Co., 29 N. H. 9.....	553
		Murphy v. Hendricks, 57 Ind. 593.....	348
		Murray v. Phillips, 59 Ind. 56...228	
		Musselman v. Manly, 42 Ind. 462.....	420

TABLE OF CASES CITED.

xv

Mustard v. Hoppess, 69 Ind. 324-532	Palmer v. Stumph, 29 Ind. 329...526
Mutual Benefit Life Ins. Co. v. Cannon, 48 Ind. 264.....448	Parish v. Kaspare, 109 Ind. 586-598
Mutual Fire Ins. Co. v. Deale, 18 Md. 26.....558	Pate v. First Nat'l Bank of Aurora, 63 Ind. 254.....100
Nace v. State, 117 Ind. 114 67	Patten v. Stewart, 24 Ind. 332...462
Naltner v. Blake, 56 Ind. 127526	Patterson v. Kentucky, 97 U. S. 501.....580
Nash v. Towne, 5 Wall. 689 11	Patterson v. Lord, 47 Ind. 203...211
Nashville, etc., R. W. Co. v. Alabama, 128 U. S. 96.....580	Patton v. Board, etc., 96 Ind. 131...427
National Bank v. Burkhardt, 100 U. S. 686.....517	Paulison v. Halsey, 38 N. J. L. 488.....344
National Bank and Loan Co. v. Dunn, 106 Ind. 110.....398	Paulus v. Latta, 93 Ind. 34.....594
National Mahaiwe Bank v. Peck, 127 Mass. 298517	Peck v. Williams, 113 Ind. 256...546
Nave v. Hadley, 74 Ind. 155.....342	Pelts v. State, 3 Blackf. 28...130, 565
Nave v. Nave, 7 Ind. 122.....204	Pence v. Aughe, 101 Ind. 317236
Neal v. State, ex rel., 49 Ind. 51...556	Penn Mut. Life Ins. Co. v. Wiler, 100 Ind. 92.....448
Neptune v. Taylor, 108 Ind. 459...239	Pennsylvania Co. v. Hoagland, 78 Ind. 203551
Nettleton v. Gridley, 21 Conn. 531.....344	Pennsylvania Co. v. Niblack, 99 Ind. 149 22
New Albany, etc., R. R. Co. v. Pickens, 5 Ind. 247 15	Pennsylvania Co. v. Sinclair, 62 Ind. 301392
New Orleans, etc., Co. v. Brown, 36 La. Ann. 138296	Pentland v. Keep, 41 Wis. 490...599
Newton v. Harris, 6 N. Y. 345...220	People v. Crosswell, 13 Mich. 427...118
New York, etc., R. R. Co. v. Doane, 105 Ind. 92..... 90	People v. Dawell, 25 Mich. 247 ..358
Nichole v. State, 89 Ind. 298.....300	People v. Hall, 4 Am. Cr. Rep. 367.....133
Noakes v. Morey, 30 Ind. 103....292	People v. McDonald, 9 Mich. 150...118
Nordyke & Marmon Co. v. Gery, 112 Ind. 635..... 32	People v. Mills, 17 Cal. 276.....118
Northcutt v. Buckles, 60 Ind. 577...281	People v. Norton, 9 N. Y. 176 ... 98
Northern Central R. W. Co. v. State, 29 Md. 420.....473	People, ex rel., v. Mahaney, 13 Mich. 481.....480
Northwestern, etc., Ins. Co. v. Blankenship, 94 Ind. 535.....141	Perry v. Ensley, 10 Ind. 378.....388
Northwestern, etc., Ins. Co. v. Hazelett, 105 Ind. 21235, 448	Peters v. Lane, 55 Ind. 391292
Northwestern, etc., Ins. Co. v. Heimann, 93 Ind. 24.....293	Phenix Ins. Co. v. Allen, 109 Ind. 273448
Nurre v. Chittenden, 56 Ind. 462-363	Phenix Ins. Co. v. Burdett, 112 Ind. 204583
Oddie v. Nat'l Bank, 45 N. Y. 735.....517	Phenix Ins. Co. etc., v. Pickel, 119 Ind. 155.....447
Ogle v. Dill, 61 Ind. 438.....211	Philbrook v. Emswiler, 92 Ind. 590.....572
Ohio, etc., R. W. Co. v. Selby, 47 Ind. 471228	Phoenix, etc., Co. v. Badger, 67 N. Y. 294..... 15
Olvey v. Jackson, 106 Ind. 286...195	Phoenix Ins. Co. v. Rowe, 117 Ind. 202.....448, 562
Oppenheim v. Pittsburgh, etc., R. W. Co., 85 Ind. 471..... 245	Pickel v. Phenix Ins. Co. 119 Ind. 291448
Orton v. Tilden, 110 Ind. 131....433, 574	Pickering v. State, 106 Ind. 228... 19, 523
Otis v. DeBoer, 116 Ind. 531.....523	Pierce v. Cloud, 42 Pa. St. 102...598
Palmer v. Chicago, etc., R. R. Co., 112 Ind. 250474	Pierce v. Mills, 21 Ind. 27.548
Palmer v. Hughes, 1 Blackf. 328-385	Pittsburgh, etc., R. R. Co. v. Biggar, 34 Pa. St. 455..... 13
	Pittsburgh, etc., R. R. Co. v. Swinney, 97 Ind. 586..... 18
	Platter v. Board, etc., 103 Ind. 360..... 77
	Pleuler v. State, 11 Neb. 547.....492

Polk v. Reynolds, 54 Ind. 449.....297	Robards v. Marley, 80 Ind. 185..308
Pollard v. Hagan, 3 How. 212 ...581	Robbins v. Shelby Co. Taxing District, 120 U. S. 489.....579
Pool v. Chicago, etc., R. W. Co., 53 Wis. 657551	Roberts v. Spencer, 112 Ind. 85... 81
Porter v. Byrne, 10 Ind. 146.....349	Robinson v. Rippey, 111 Ind. 112..523
Porter v. Jackson, 95 Ind. 210 ...183	Robinson v. Thraillkill, 110 Ind. 117.....599
Postmaster-General v. Rice, Gilpin, 554.....170	Rockhill v. Spraggs, 9 Ind. 30 ...588
Potter v. Earnest, 45 Ind. 416.....572	Rogers v. Hastings, etc., R. W. Co., 22 Minn. 25.....296
Powell v. Martin, 10 Iowa, 568..133	Rogers v. State, 6 Ind. 31.....480
Powers v. Fletcher, 84 Ind. 154... 42	Rogers v. Walker, 47 Am. Dec. 470.....466
Pratt v. New York, etc., Ins. Co., 64 Barb. 589 33	Rogers v. Zook, 86 Ind. 237.....308
Prezinger v. Harness, 114 Ind. 491.....523	Roots v. Beck, 109 Ind. 472..439, 598
Price v. Jennings, 62 Ind. 111...513	Rose v. Ingram, 98 Ind. 276548
Price v. Woodford, 43 Mo. 247...175	Rosenfeld v. Peoria, etc., R. W. Co., 103 Ind. 121 77
Proctor v. Cole, 104 Ind. 373.....111	Ross v. Faust, 54 Ind. 471.....356
Proctor v. Cole, 115 Ind. 15.....111	Ross v. Stackhouse, 114 Ind. 200..191, 523, 526
Proctor v. Owens, 18 Ind. 21..... 41	Rosser v. Barnes, 16 Ind. 502.....292
Puett v. Beard, 86 Ind. 104..266, 382	Rucker v. Steelman, 73 Ind. 396.. 18, 60, 120
Quarl v. Abbett, 102 Ind. 233.....245	Ruffing v. Tilton, 12 Ind. 259.....424
Quick v. Brenner, 101 Ind. 230...364	Rutherford v. Moore, 24 Ind. 311..... 18
Quick v. Milligan, 108 Ind. 419..408	Ryman v. Crawford, 86 Ind. 262..219
Quigley v. Thompson, 53 Ind. 317..... 85	
Quill v. Gallivan, 108 Ind. 235...430	
	Sage v. Brown, 34 Ind. 464292
Ragsdale v. Mitchell, 97 Ind. 458.....524	Salter v. Salter, 98 Ind. 522.....337
Railroad Co. v. Androscoggin Mills, 22 Wall. 594 76	Sanford v. Wood, 49 Ind. 165.....344
Railroad Co. v. Aspell, 23 Pa. St. 147.....551	Santa Clar. Mining Ass'n v. Meredith, 49 Md. 389.....296
Railroad Co. v. Husen, 95 U. S. 465.....579	Sargeant Ex Parte, 1 Rose 153...518
Railway Co. v. Valleley, 32 Ohio St. 345.....473	Sayers v. First Nat'l Bank, 89 Ind. 230 .. 77
Raymond v. Smith, 1 Metc. 65...343	Schee v. Wiseman, 79 Ind. 389...342
Redden v. Baker, 86 Ind. 191.....234	Scheible v. Slagle, 89 Ind. 323...349
Reed v. Insurance Co., 95 U. S. 23 11	Schmidt v. State, 78 Ind. 41..130, 566
Reeves v. Plough, 41 Ind. 204.....292	Schoonover v. Reed, 65 Ind. 313..343
Reissner v. Oxley, 80 Ind. 580 ... 11	Schroder v. Crawford, 94 Ill. 357..393
Reno v. Tyson, 24 Ind. 56419	Schuff v. Ransom, 79 Ind. 458 .. 70
Reynolds v. Commerce Fire Ins. Co., 47 N. Y. 597 11	Scobey v. Ross, 13 Ind. 117..... 85
Reynolds v. Faris, 80 Ind. 14533	Scobey v. Walker, 114 Ind. 254...164
Richey v. Merritt, 108 Ind. 347..548	Scott v. Brackett, 89 Ind. 413283
Ricketts v. Spraker, 77 Ind. 371..523	Scott v. Scott, 17 Ind. 309358
Ridenour v. Beekman, 68 Ind. 236.....456	Scott v. Scott, 1 Eden, 458.....336
Ridenour v. Miller, 83 Ind. 208..457	Scott v. State, 64 Ind. 400...134, 220
Ridgway v. Ludlow, 58 Ind. 248..356	Scott v. United States, 12 Wall. 443..... 11
Riley v. State, 95 Ind. 446.....384	Scotten v. Randolph, 96 Ind. 581..302
Rinard v. West, 48 Ind. 159342	Scotton v. Mann, 89 Ind. 404556
Rinard v. West, 92 Ind. 359342	Scraper v. Pipes, 59 Ind. 158.....457
Ritchie v. South Topeka, 38 Kan. 368.....527	Sudder v. State, 62 Ind. 13.270
	Secor v. Souder, 95 Ind. 95 90
	Secor v. Toledo, etc., R. R. Co., 10 Fed. Rep. 15.....552
	Security Co. v. Arbuckle, 119 Ind. 69.....196

TABLE OF CASES CITED.

xvii

Sellers v. Beaver, 97 Ind. 111.....	339	State v. Berdetta, 73 Ind. 185.....	130,
Shackelford v. New Orleans, etc.,			300, 565
R. R. Co., 37 Miss 202.....	296	State v. Bougher, 3 Blackf. 307....	130,
Shafer v. State, 74 Ind. 90.....	179		565
Shaffer v. State, 27 Ind. 131	126	State v. Collins, 17 Atl. Rep. 131..	50
Shea v. Quintin, 30 Iowa, 58.....	245	State v. Commonwealth, 12 Pe-	
Shearer v. State, 7 Blackf. 99.....	303	ters, 657.....	522
Shearman v. Niagara, etc., Ins.		State v. Cross, 12 Iowa, 66.....	118
Co., 46 N. Y. 526	33	State v. Daney, 83 N. C. 608.....	118
Shellhouse v. State, 110 Ind. 509..	599	State v. Dittmar, 120 Ind. 54.....	389
Shepherd v. State, 54 Ind. 25.....	203	State v. Gove, 34 N. H. 510.....	203
Sheppard v. Collins, 12 Iowa, 570..	312	State v. Griffin, 89 Mo. 49.....	565
Sherlock v. Ailling, 93 U. S. 99....	580	State v. Isabel, 40 La. Ann. 340..	494
Shinn v. State, 68 Ind. 423.....	130, 565	State v. Jaeger, 66 Mo. 173....	119
Shoemaker v. McMonigle, 86 Ind.		State v. Jenkins, 120 Ind. 268....	300
421.....	349	State v. Johnston, 76 N. C. 209....	118
Short v. Home Ins. Co., 90 N. Y.		State v. Lay, 93 Ind. 341.....	202
16.....	36	State v. Louisville, etc., R. W.	
Short v. State, 63 Ind. 376.....	179	Co., 86 Ind. 114.....	390
Shrock v. Crowl, 83 Ind. 243.....	513	State v. McCaffrey, 63 Iowa, 479..	118
Shropshire v. Kennedy, 84 Ind.		State v. Mellor, 13 R. I. 686.....	379
111.....	41	State v. Miller, 98 Ind. 70..130,	270,
Shular v. Shular, 56 Ind. 30	388		565
Simkins v. Smith, 94 Ind. 470....	25	State v. Portsmouth Savings	
Simmons v. Lindley, 108 Ind.		Bank, 106 Ind. 435.....	356, 439
297.....	420	State v. Smith, 74 Ind. 557.....	269
Simonton v. Thompson, 55 Ind.		State v. Tarr, 28 Iowa, 397.....	118
87.....	63	State v. Turnbull, 78 Maine, 392..	565
Sims v. Burk, 109 Ind. 214.....	405	State v. Walker, 26 Ind. 346.....	125
Sims v. Dame, 113 Ind. 127....90,	420	State v. Weil, 89 Ind. 286.....	66
Sims v. Gay, 109 Ind. 501.....	19, 82	State v. Welch, 88 Ind. 308.....	566
Singer Mfg Co. v. Forsyth, 108		State v. Wright, 52 Ind. 307.....	269
Ind. 334.....	10, 588	State, ex rel., v. Bonnell, 119 Ind.	
Skaggs v State, 108 Ind. 53.....	270	494.....	491
Skinner v. State, 120 Ind. 127.....	565	State, ex rel., v. Cooper, 114 Ind:	
Slaughter-House Cases, 16 Wall.		12.....	391
36	580	State, ex rel., v. Crawfordville,	
Slauter v. Favorite, 107 Ind. 291..	355	etc., T. P. Co., 102 Ind. 283....	339
Sloan v. State, 42 Ind. 570.....	269	State, ex rel., v. Demaree, 80 Ind.	
Smith v. Alabama, 124 U. S. 465..	580	519.....	427
Smith v. Kirkpatrick, 58 Ind.		State, ex rel., v. Flemming, 46	
254	344	Ind. 206.....	115
Smith v. Popular Loan, etc.,		State, ex rel., v. Givan, 45 Ind.	
Ass'n, 93 Pa. St. 19	308	267.....	115
Smith v. Rogers, 14 Ind. 224.....	363	State, ex rel., v. Indiana and	
Smith v. Smith, 106 Ind. 43	90	Ohio, etc., Mining Co., 120 Ind.	
Smith v. State, ex rel., 117 Ind.		575.....	600
167.....	332	State, ex rel., v. Insurance Co.	
Smotherman v. St. Louis, etc., R.		115 Ind. 257.....	583
W. Co., 29 Mo. App. 265	552	State, ex rel., v. Kennett, 114	
Snowden v. Wilas, 19 Ind. 10.....	599	Ind. 160.....	573
Spaulding v. Baldwin, 31 Ind.		State, ex rel., v. Kent, 53 Ind.	
376.....	82	112.....	115
Spencer v. McGonagle, 107 Ind.		State, ex rel., v. Neff, 74 Ind. 146..	25
410.....	441	State, ex rel., v. Roudebush, 114	
Spraker v. Armstrong, 79 Ind.		Ind. 347.....	97
577.....	422	State, ex rel., v. Sanders, 62 Ind.	
Springstein v. Samson, 32 N. Y.		562.....	330
703.....	11	State, ex rel., v. St. Paul, etc., T.	
State v. Allisbach, 69 Ind. 50..130,	565	P. Co., 92 Ind. 42.....	339

State, ex rel., v. Woodruff Sleeping Coach Co., 114 Ind. 155.....	578	Taylor v. Goodwin, L. R. 4 Q. B. Div. 228.....	51
State, ex rel., v. Younts, 89 Ind. 313.....	312	Teague v. Fowler, 56 Ind. 569.....	509
Steel v. Grigsby, 79 Ind. 184.....	42	Terre Haute, etc., R. R. Co., v. Buck, 96 Ind. 346.....	551
Steen v. Niagara, etc., Ins. Co., 89 N. Y. 315.....	33	Terre Haute, etc., R. R. Co. v. McMurray, 98 Ind. 358.....	473
Steeple v. Downing, 60 Ind. 478.....	350	Teter v. Teter, 101 Ind. 129.....	235
Steinmetz v. Kelly, 72 Ind. 442.....	392	Thayer v. Burger, 100 Ind. 262.....	457
Steinmetz v. Wingate, 42 Ind. 574.....	395	Thayer v. Younge, 86 Ind. 259.....	589
Stephen v. State, 11 Ga. 225.....	118	Thiebaud v. Dufour, 54 Ind. 320.....	97
Stephens v. Gibbs, 14 Fla. 331.....	175	Thomas v. Dale, 86 Ind. 435.....	42
Stephens v. State, 107 Ind. 185.....	116	Thompson v. Munger, 15 Texas, 523.....	80
Sterne v. Vert, 108 Ind. 232.....	267	Thompson v. Peck, 115 Ind. 512.....	462
Sterne v. Vert, 111 Ind. 408.....	267	Thompson v. Rose, 41 Am. Dec. 121.....	546
Stevens v. Tucker, 73 Ind. 73.....	342	Thompson v. Thompson, 9 Ind. 323.....	588
Stilwell v. Knapper, 69 Ind. 558.....	336	Tilden v. Barnard, 43 Mich. 376.....	303
St. Louis, etc., R. R. Co. v. Cantrell, 37 Ark. 519.....	551	Titus v. Mechanics' Nat'l Bank, 35 N. J. L. 588.....	517
St. Louis, etc., R. W. Co. v. Johnston, 27 Fed. Rep. 243.....	518	Toler v. Keiher, 81 Ind. 383.....	100
St. Louis, etc., R. W. Co. v. Weakly, 50 Ark. 397.....	76	Toops v. State, 92 Ind. 13.....	130, 565
Stockton v. Stockton, 40 Ind. 225.....	141	Tower v. Hartford, 115 Ind. 186.....	335
Stockwell v. State, ex rel., 101 Ind. 1.....	424	Town of Knightstown v. Musgrove, 116 Ind. 121.....	206
Stone v. Brown, 116 Ind. 78.....	141	Town of Martinsville v. Shirley, 84 Ind. 546.....	40
Stone v. French, 37 Kan. 145.....	164	Town of Salem v. Goller, 76 Ind. 291.....	392
Stone v. Graves, 8 Mo. 148.....	80	Town of Westerville v. Freeman, 66 Ind. 255.....	398
Stone v. Mississippi, 101 U. S. 814.....	492	Trade-Mark Cases, 100 U. S. 82.....	579
Stone v. State, ex rel., 97 Ind. 345.....	134, 220	Traders Ins. Co. v. Newman, 12 Ind. 554.....	594
Stoner v. Ellis, 6 Ind. 152.....	100	Trammel v. Chipman, 74 Ind. 474.....	70
Stonsel v. Abrams, 7 Blackf. 516.....	80	Travellers Ins. Co. v. Chappelow, 83 Ind. 429.....	195, 546
Stout v. Woods, 79 Ind. 108.....	245	Trentman v. Fletcher, 100 Ind. 105.....	425
Strieb v. Cox, 111 Ind. 299.....	523	Trisler v. Trisler, 54 Ind. 172.....	286
Strong v. Beroujoin, 18 Ala. 168.....	344	Trout v. West, 29 Ind. 51.....	292
Stuckmyer v. State, 29 Ind. 20.....	130, 565	Trumbull v. Gibbons, 51 Am. Dec. 253.....	466
Sullivan v. Philadelphia, etc., R. R. Co., 30 Pa. St. 234.....	552	Tucker v. Conrad, 103 Ind. 349.....	141
Summers v. Greathouse, 87 Ind. 205.....	292	Tucker v. State, ex rel., 72 Ind. 242.....	97
Supreme Council v. Garrigus, 104 Ind. 133.....	308	Tucker v. Tucker, 113 Ind. 272.....	10
Swazey v. Union Mfg. Co., 42 Conn. 556.....	473	Tucker v. Welsh, 17 Mass. 160.....	133
Symonds v. Northwestern, etc., Ins. Co., 23 Minn. 491.....	35	Turner v. Armstrong, 9 Bradwell, 24.....	312
Taber v. Ferguson, 109 Ind. 227.....	191, 526	Turner v. Austin, 16 Mass. 181.....	133
Taber v. Grafmiller, 109 Ind. 206.....	526	Turner v. First Nat'l Bank, 78 Ind. 19.....	19
Tardy v. Howard, 12 Ind. 404.....	457	Uhrg v. Sinex, 32 Ind. 493.....	313
Taylor v. Duesterberg, 109 Ind. 165.....	26	Ulmer v. State, 14 Ind. 52.....	202
		Underwood v. Hossack, 40 Ill. 98.....	433

TABLE OF CASES CITED.

xix

Union M. L. Ins. Co. v. Buchanan, 100 Ind. 63.....	475	Wantlan v. White, 19 Ind. 470.....	283
United States v. De Witt, 9 Wall. 41.....	580	Ward v. Polk, 70 Ind. 309.....	297
United States v. Gale, 109 U. S. 65.....	380	Ward v. Smith, 7 Wall. 447.....	386
United States v. Linn, 1 Howard, 104.....	80	Warey v. Forst, 102 Ind. 205.....	572
United States v. Perez, 9 Wheaton, 579.....	125	Warner v. State, 114 Ind. 137.....	383
United States v. Reese, 92 U. S. 214.....	579	Waterbury v. Netherland, 6 Heisk. 512.....	175
United States Ex. Co. v. Backman, 28 Ohio St. 144.....	77	Watkins v. Winings, 102 Ind. 330.....	524
United States Ex. Co. v. Harris, 51 Ind. 127.....	76	Webb v. Zeller, 70 Ind. 408.....	344
Utterback v. Terhune, 75 Ind. 363. 441		Weber v. Christen, 121 Ill. 91.....	164
Valle v. Fleming, 19 Mo. 454.....	82	Welch v. State, 104 Ind. 347.....	220
Vandunyn v. Hepner, 45 Ind. 589. 439		Welty v. Indianapolis, etc., R. Co., 105 Ind. 55.....	473
Van Etten v. Hurst, 6 Hill, 311.. 80		Welz v. Rhodius, 87 Ind. 1.....	588
Van Gorder v. Smith, 99 Ind. 404.....	335	West v. Cavins, 74 Ind. 265.....	211
Village of Hyde Park, v. Borden, 94 Ill. 26.....	526	Western Union Tel. Co. v. Locke, 107 Ind. 9.....	123
Vinton v. Baldwin, 95 Ind. 433.. 77		Western Union Tel. Co. v. Massachusetts, 125 U. S. 530.....	579
Virginia Coupon Cases, 114 U. S. 260.....	579	Western Union Tel. Co. v. Pendleton, 122 U. S. 347.....	580
Vogel v. Leichner, 102 Ind. 55. 362, 572		West Virginia, etc., Co. v. Volcanic Co., 5 West Va. 382.....	577
Voltz v. Newbert, 17 Ind. 187.....	60	Weston v. Johnson, 48 Ind. 1.....	281
Voss v. Eller, 109 Ind. 260.....	388	Weston v. Stuart, 11 Maine, 326. 344	
Wabash, etc., R. W. Co. v. Farmer, 111 Ind. 195.....	51	Weymire v. Wolfe, 52 Iowa, 533. 473	
Wabash, etc., R. W. Co. v. Shacklet, 105 Ill. 364.....	206	Wheeler v. Hawkins, 116 Ind. 515.....	321
Wagner v. Town of Garrett, 118 Ind. 114.....	487	Wheeler v. Ruston, 19 Ind. 334.. 72	
Wagoner v. Wilson, 108 Ind. 210. 141		White v. Flynn, 23 Ind. 146.....	283
Wainwright v. Flanders, 64 Ind. 306.....	546	Whitney v. Wyman, 101 U. S. 392.....	15
Walker v. Great Western R. W. Co., L. R. 2. Exch. 228.....	473	Williams v. Coleman, 49 Mo. 325.....	312
Walker v. Heller, 73 Ind. 46.....	423	Williams v. Henderson, 90 Ind. 577.....	343
Walker v. Hill, 111 Ind. 223.....	19, 82	Williams v. Osborn, 75 Ind. 280.. 25	
Wallace v. Kirtley, 98 Ind. 485.. 42		Williams v. Osborne, 95 Ind. 347.. 25	
Wallace v. McConnell, 13 Peters, 131.....	386	Williams v. State, 47 Ind. 568 ...	270
Wallace v. Milligan, 110 Ind. 498.....	199	Williams v. Stevenson, 103 Ind. 243.....	425
Wallace v. Western, etc., R. R. Co., 98 N. C. 494.....	553	Williams v. Thames, etc., Co., 105 Ind. 420.....	388
Walter v. Town of Columbia City, 61 Ind. 24.....	487	Williamsport, etc., Co. v. Pinkerton, 95 Pa. St. 62.....	386
Walterhouse v. Garrard, 70 Ind. 400.....	572	Willis v. Long Island, etc., R. R. Co., 34 N. Y. 670.....	552
Walters v. Hutchins, 29 Ind. 136. 344		Wilson v. Hamilton, 75 Ind. 71.. 421	
Walton v. United States, 9 Wheat. 651.....	433	Wilson v. Hill, 3 Metc. 66.....	33
		Wilson v. Ray, 13 Ind. 1.....	510
		Wingler v. Simpson, 93 Ind. 204.. 63	
		Wishmier v. State, ex rel., 110 Ind. 523.....	433
		Wolfe v. Pugh, 101 Ind. 293.....	215
		Woodbury v. Parshley, 7 N. H. 237.....	599
		Woodford v. Dorwin, 3 Vt. 82.....	165
		Woods v. Polhemus, 8 Ind. 60....	462

TABLE OF CASES CITED.

Woolen v. Rockafeller, 81 Ind.	Wright v. Jordan, 71 Ind. 1	556
208..... 18	Wright v. Potter, 38 Ind. 61	215
Woollen v. Wire, 110 Ind. 251...100	Wright v. Wright, 2 Md. 429	558
Woolery v. Grayson, 110 Ind. 149-441		
Woolery v. Louisville, etc., R.W.	Yates v. Houston, 3 Texas, 433...235	
Co., 107 Ind. 381		553
Wray v. Hill, 85 Ind. 546		41
Wright v. Jones, 105 Ind. 17.....184	Zook v. Simonson, 72 Ind. 83.....	302

STATUTES CITED AND CONSTRUED.

Const. Art. 4, section 21.....	479	Section 1656, R. S. 1881.....	379
Const. Art. 8, sections 3, 6.....	233	Section 1679, R. S. 1881.....	177
Section 251, R. S. 1881.....	350, 556	Section 1731, R. S. 1881.....	269, 300
Section 294, R. S. 1881.....	594	Section 1734, R. S. 1881.....	201
Section 318, R. S. 1881.....	246	Section 1737, R. S. 1881.....	230
Section 339, R. S. 1881.....	419	Section 1755, R. S. 1881.....	269, 300
Section 341, R. S. 1881.....	18	Section 1788, R. S. 1881.....	202
Section 343, R. S. 1881.....	18	Section 1834, R. S. 1881.....	118
Section 362, R. S. 1881.....	90	Section 1897, R. S. 1881.....	299
Section 368, R. S. 1881.....	385	Section 1904, R. S. 1881.....	202
Section 391, R. S. 1881.....	73	Section 1927, R. S. 1881.....	322
Section 409, R. S. 1881.....	280	Section 1941, R. S. 1881.....	229
Section 412, R. S. 1881.....	422	Section 1964, R. S. 1881.....	299
Section 415, R. S. 1881.....	224	Section 1988, R. S. 1881.....	154
Section 496, R. S. 1881.....	214	Section 2070, R. S. 1881.....	566
Section 499, R. S. 1881.....	214	Section 2087, R. S. 1881.....	66
Section 537, R. S. 1881.....	252	Section 2091, R. S. 1881.....	124
Section 546, R. S. 1881.....	253	Section 2097, R. S. 1881.....	123
Section 550, R. S. 1881.....	41	Section 2098, R. S. 1881.....	93
Section 551, R. S. 1881.....	41, 280	Section 2162, R. S. 1881.....	55, 389
Section 552, R. S. 1881.....	41	Section 2324, R. S. 1881.....	183
Section 561, R. S. 1881.....	90	Section 2442, R. S. 1881.....	340
Section 609, R. S. 1881.....	199	Section 2483, R. S. 1881.....	173
Section 629, R. S. 1881.....	433	Section 2487, R. S. 1881.....	173
Section 630, R. S. 1881.....	122	Section 2491, R. S. 1881.....	583
Section 632, R. S. 1881.....	267	Section 2544, R. S. 1881.....	465
Section 638, R. S. 1881.....	251	Section 2670, R. S. 1881.....	159
Section 646, R. S. 1881.....	123	Section 2981, R. S. 1881.....	510
Section 655, R. S. 1881.....	424	Section 3095, R. S. 1881.....	169
Section 674, R. S. 1881.....	547	Section 3106, R. S. 1881.....	487
Section 676, R. S. 1881.....	547	Section 3154, R. S. 1881.....	487
Section 682, R. S. 1881.....	26	Sections 3161-3163, R. S. 1881...	259
Section 710, R. S. 1881.....	160	Section 3166, R. S. 1881.....	258
Section 743, R. S. 1881.....	43	Section 3167, R. S. 1881.....	258
Section 913, R. S. 1881 (Proviso)	500	Sections 3168-3171, R. S. 1881...	259
Section 1038, R. S. 1881.....	358	Section 3641, R. S. 1881.....	339
Section 1054, R. S. 1881.....	18	Section 3987, R. S. 1881.....	266
Section 1056, R. S. 1881.....	60	Section 4020, R. S. 1881.....	290, 374
Sections 1058, 1061, R. S. 1881...	17	Section 4021, R. S. 1881.....	375,
Section 1073, R. S. 1881.....	350	Section 4346, R. S. 1881.....	442
Section 1221, R. S. 1881.....	84	Section 4904, R. S. 1881, clause 4,	508
Section 1325, R. S. 1881.....	452	Section 5015, R. S. 1881.....	148
Section 1326, R. S. 1881.....	452	Section 5046, R. S. 1881.....	148
Section 1327, R. S. 1881.....	452	Sections 5047-9-9, R. S. 1881...	148
Section 1387, R. S. 1881.....	177	Section 5091, R. S. 1881.....	161

xxii STATUTES CITED AND CONSTRUED.

Section 5095, R. S. 1881.....	86	2 G. & H., p. 494, section 34....	82
Section 5115, R. S. 1881.....	362	2 G. & H., p. 517, section 112...	81
Section 5116, R. S. 1881.....	561	Acts 1865, Spec. Sess., p. 144.....	282
Section 5117, R. S. 1881.....	561	Acts 1875, Spec. Sess., p. 56, sec-	
Section 5119, R. S. 1881.....	362, 572	tion 6	479, 485
Section 5312, R. S. 1881.....	136	Acts 1883, p. 17.....	577
Section 5314, R. S. 1881.....	137	Acts 1883, p. 106	563
Section 5317, R. S. 1881.....	482, 485	Acts 1885, p. 202	153
Section 5319, R. S. 1881.....	486	Acts 1885, p. 239	173
Section 5323, R. S. 1881.....	391	Acts 1889, p. 22	577
Section 5534, R. S. 1881.....	172	Acts 1889, p. 38.....	577
1 R. S. 1876, p. 896.....	191	Acts 1889, p. 369.....	576
2 R. S. 1876, p. 418.....	178	Acts 1889, p. 395	478, 485
2 G. & H., p. 158, section 211...	438		

JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.* †
HON. JOSEPH A. S. MITCHELL. ‡
HON. JOHN G. BERKSHIRE. §
HON. WALTER OLDS. §
HON. SILAS D. COFFEY. §

* Chief Justice at the May Term, 1889.

† Term of office commenced January 3d, 1887.

‡ Term of office commenced January 6th, 1885.

§ Term of office commenced January 7th, 1889.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
WILLIAM T. NOBLE.

SHERIFF,
JAMES L. YATER.

LIBRARIAN,
WILLIAM W. THORNTON.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1889, IN THE SEVENTY-THIRD
YEAR OF THE STATE.

120	1
128	494

No. 11,772.

THE MANHATTAN CLOAK AND SUIT COMPANY ET AL. v.
DODGE ET AL.

INSOLVENT DEBTORS.—Attorney for Assignee.—Borrowing Trust Funds.—Purchase of Claims.—Profits.—Where the attorney for the assignee of insolvent debtors borrows trust funds from the assignee, and uses the money in purchasing claims against the debtors, which are afterwards filed against the estate and allowed by the assignee, he is bound to account to the estate for any profits realized by him in the transaction, although there may be no fraudulent purpose.

SAME.—Replevin.—Value of Goods.—Judgment not Conclusive.—Where some of the claims are purchased by the attorney from creditors who have brought an action to replevy goods sold to the insolvents, and he causes judgment to be entered in favor of the replevin plaintiffs, declaring that the goods are of the value stated in their affidavits, and then sells such goods at private sale on his own account, he is not concluded by the value as fixed by the judgment, but is only bound to account for the true value.

SAME.—Interest.—When Assignee Chargeable with.—The assignee of insolvent debtors is chargeable with interest on the funds in his hands from the

The Manhattan Cloak and Suit Company *et al.* v. Dodge *et al.*

time when, by the exercise of diligence, he could have secured an order declaring a dividend.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

H. C. Dodge, R. M. Johnson, E. G. Herr and J. I. Best,
for appellees.

ELLIOTT, C. J.—The assignee of insolvent debtors allowed claims against the estate of the insolvent, and made a report of his action. To this report the appellants, in the capacity of creditors, filed exceptions. Issues of fact were presented by the exceptions, evidence was heard and a decision entered against the appellants.

The attorney of the assignee of the insolvent debtors borrowed from the assignee trust funds, and paid him interest on the money borrowed. The assignee, in his report, fully accounted for the money loaned and the interest received from the borrower. The money thus obtained by the attorney was by him used in buying claims against the insolvent debtors, and these claims were, after the purchase by the attorney, filed against the insolvents' estate and were allowed by the assignee. The claims were bought by the attorney for a sum greatly below their face value.

We are clear that the attorney had no right to reap any profit from the purchases made by him with the trust funds. It was the duty of the court to require the assignee to account for the profits realized by his attorney. The position occupied by the latter imposed upon him the obligation to devote his labor and his talents to the service of the creditors whom the assignee represented. He had no right, occupying the position he did, to engage in buying claims for his individual benefit, and, as the assignee knew of the conduct of his attorney, he violated his duty in allowing him to secure more than the actual cost of the claims. Whatever profit accrued from the use of the trust funds by the attorney belonged, in equity, to the persons entitled to the funds. It

The Manhattan Cloak and Suit Company *et al.* v. Dodge *et al.*

would violate plain principles of justice to permit the attorney of the assignee of an insolvent debtor to use the trust fund for his own profit. Trust funds are to be used for the benefit of the beneficiaries under the trust, and not for the benefit of anybody else.

It would be subversive of justice to permit an attorney of a trustee to use his position for his individual benefit, although he made no use of the trust funds, and we are satisfied that, even where an attorney purchases the claims of creditors with his own money he can obtain, at most, no more than the sum he actually paid for them. The policy of the law is to prevent an attorney from sacrificing the interests of his client for his own gain, and to carry into effect this policy the courts will not allow an attorney to take advantage of his position to the possible injury of his client. *Downard v. Hadley*, 116 Ind. 131; *In re Marquand*, 57 How. Pr. 477; *Ex Parte James*, 8 Vesey, Jr., 337.

The assignee of an insolvent debtor owes a duty to all of the creditors. He certainly can not be allowed to buy claims from creditors and reap a profit. The reason for this rule operates against the assignee's attorney, for he, as the trusted confidential adviser of the trustee, represents all of the beneficiaries. To him the assignee, as the representative of all the creditors, must look for advice, and that advice must come from an unbiased mind. He has no right to deal with them, or any of them, for his own benefit, for the instant he becomes interested he ceases to occupy the position which it is his duty to his clients to maintain. To permit the attorney to buy claims even with his own money, would open the way to fraud and wrong, and such ways it is the duty of the courts to tightly and securely close. The law means to keep attorneys from assuming positions where they may be tempted to prefer their own interests to those of their clients. To deter them from assuming such positions it sternly denies them the right to secure any profit from their transactions with their clients, and requires them to yield it to the trust

The Manhattan Cloak and Suit Company et al. v. Dodge et al.

it was their duty to serve with undivided zeal and interest.

In cases of this character it is unnecessary to prove a corrupt design or fraudulent practices. The intention may be honest, and yet the act be wrongful in legal contemplation. The wrong emerges from the improper departure from duty, and is complete without an evil or fraudulent purpose.

The attorney bought claims with funds borrowed from the assignee, from Hood, Bonbright & Co., Bates, Reed & Cooley, and Mills & Gibbs, after they had brought an action to replevy goods sold by them to the insolvent debtors. After he purchased the claims he caused judgment to be entered in favor of the several replevin plaintiffs, declaring that the goods were of the value stated in the respective affidavits; that he afterwards took the goods so adjudged to belong to the several plaintiffs, and sold them at private sale on his own account, without having them appraised. The aggregate value fixed upon the goods in the replevin cases was \$3,299.73, and the amount realized from the sale was \$2,141.42. The counsel for the appellants contends that the value fixed by the judgment concludes the attorney, and that he must account to the estate for the value of the goods as fixed by the judgment. We can not so hold. The attorney was not bound to account for anything more than the true value of the goods he bought with the trust funds. He was chargeable with that, but with no more. If he did do wrong, as is probably true, the extent of the injury worked by his wrong was the loss actually sustained, and that could not be greater than the true value of the goods he received. The object of the law is not to punish the attorney in such cases as this, but to secure to the client full compensatory damages.

The assignee collected from the sale of the property of the insolvent debtors the following sums of money at the dates respectively mentioned: February 20th, 1883, \$8,-633.50; August 20th, 1883, \$328.05; August 21st, 1883, \$1,030; December 18th, 1883, \$578; December 29th, 1883, \$500. The money was not paid to the clerk by the assignee

The Manhattan Cloak and Suit Company et al. v. Dodge et al.

until the time of making his final report, January 28th, 1884. He neglected to pay over the money on the advice of his attorney, to whom the greater part of the trust fund was loaned.

The assignee should be charged with interest during the period he unreasonably withheld the money. It was his duty to have had a dividend declared as soon as the probable amount of the claims could be ascertained. As he received in bulk the greater part of the money of the estate at one time, he was bound to exercise diligence to secure a statement of the amount of the claims, present it to the court, and ask an order declaring a dividend. A trustee has no right to keep money from the beneficiaries when by reasonable diligence he can secure an order for their benefit. In this instance, the assignee having received the greater part of the funds of the estate at one time, the court should have charged him with interest after the lapse of such time as would have enabled him by the exercise of diligence to have secured an order declaring a dividend. *Bishop Insolvent Debtors* (2d ed.), 365. He had no right to withhold all the money until his final report was filed, for dividends may be declared when the amount can be ascertained although without absolute accuracy, as the court may approximate the exact amount. Doubtless an assignee may show an excuse, where one exists, for failing to secure an order declaring a dividend, but no such excuse is here shown; on the contrary, it clearly appears that the delay was without any legal excuse whatever.

Judgment reversed, with instructions to grant a rehearing upon the exceptions, and to proceed in accordance with this opinion.

MITCHELL, J., did not take part in the decision of this case.

Filed May 14, 1889; petition for a rehearing overruled Sept. 18, 1889.

 Cravens v. The Eagle Cotton Mills Company.

No. 14,340.

CRAVENS v. THE EAGLE COTTON MILLS COMPANY.

CORPORATION.—*Subscription for Stock.*—*Contract.*—*Collateral Matters.*—Where a corporation is organized for the purpose of acquiring and operating a cotton mill, any pending negotiations between such corporation and another corporation, engaged in the same business, relating to the purchase of the latter's plant and good-will, are matters collateral to contracts of subscription made with the new corporation, and in no manner affect or enter into the same.

SAME.—*Collateral Agreement.*—*Consummation of.*—*Parol Evidence.*—Where a subscriber claims exoneration from liability on his subscription on the ground that an alleged previous agreement between the corporation and another company for the purchase of its plant has been changed and the purchase made upon different terms, it is competent to show that no agreement between the two corporations was consummated prior to the contract of subscription.

SAME.—*Condition Precedent.*—*Liability for Subscription.*—A stipulation in a contract of subscription that the amount subscribed is not to be payable until any contract which may be made with another corporation for the purchase of its mills has been ratified by the persons holding a majority of the stock, has reference to a matter collateral to the contract of subscription, and the making of a contract of a specified character is not a condition precedent to the liability of the subscribers for stock, and they can not withdraw their subscriptions, or defeat their collection by assailing the contract that is actually made and ratified as stipulated.

SAME.—*Conditional Subscription.*—*Acceptance.*—Where subscriptions are made upon the condition that solvent subscriptions to a certain amount shall be obtained, the obtaining of the required amount is an effectual acceptance of all conditional subscriptions, and the latter then become absolute.

SAME.—*Withdrawal of Subscription.*—A subscriber can not withdraw his subscription, even though it be conditional, unless unreasonable delay occurs in performing the condition.

SAME.—*Existence of Corporation.*—*Estoppel.*—Where a contract of subscription is made upon the assumption of the existence of the corporation, both the corporation and the subscriber are afterwards estopped from denying its existence.

From the Jennings Circuit Court.

120 6
 120 600
 120 6
 124 65
 124 408
 120 6
 126 677
 120 6
 147 611
 120 6
 155 550

Cravens v. The Eagle Cotton Mills Company.

C. E. Walker, A. D. Vanosdol and H. Francisco, for appellant.

C. A. Korbly and W. O. Ford, for appellee.

MITCHELL, J.—This action was brought by the Eagle Cotton Mills Company, of Madison, Indiana, a manufacturing corporation organized under the general law of this State, to collect \$4,000 alleged to be due from Charles L. Cravens upon a subscription made by the latter to the capital stock of the plaintiff. The facts are set out at great length, and in minute detail, in a special finding made by the court. Those material to present the questions for decision are the following: In November, 1883, a communication was presented to the Merchants and Manufacturers' Club, a voluntary association of the city of Madison, in which it was stated that the Eagle Cotton Mills Company, a corporation owning and operating two large cotton mills in the vicinity of Pittsburgh, Pennsylvania, with a view of transferring its business to this State, would sell all its machinery, including the good-will of its business, to an Indiana corporation, if one were legally organized. The price proposed was \$100,000, of which amount \$40,000 would be required to be paid in cash, and \$60,000 in the capital stock of the new corporation. The scheme was regarded favorably by the club, and by the citizens of Madison, and the Eagle Cotton Mills Company, of Madison, Indiana, was duly organized and incorporated on the 13th day of November, 1883, the object of its formation being to acquire and own a cotton mill, and to engage in the manufacture of raw cotton into textile fabrics. The proposition theretofore made to the Merchants and Manufacturers' Club was under consideration when the Eagle Cotton Mills Company was organized, and while its stock was being subscribed for. The capital stock was fixed at \$250,000, and was divided into shares of \$25 each. The defendant was one of the incorporators of the company, an active promoter of the organization, and solicited subscriptions to its stock, and sub-

Cravens v. The Eagle Cotton Mills Company.

scribed for one hundred and sixty shares in his own name. It was stipulated in the contract of subscription that the several subscribers should pay for the number of shares set opposite their respective names upon the call of the board of directors, provided solvent subscriptions to the amount of \$125,000, including \$60,000 promised to be subscribed by the Eagle Cotton Mills Company of Pittsburgh, should first be obtained; and provided further, that the amount subscribed was not to be payable until the contract with the last named company, for the purchase of its mills, had been ratified by the votes of those holding a majority of the stock subscribed outside the city of Pittsburgh. It is found that solvent subscriptions for the required amount had been secured, and that on the 3d day of April, 1884, after considering various propositions from the Pittsburgh corporation and others, a contract for the purchase of substantially the entire plant, including the good-will of the latter corporation, had been executed. The Madison corporation agreed to pay the other \$20,000 in cash, and to transfer \$95,000 of its paid-up capital stock as a consideration for the property, which was to be transferred and delivered to it at Madison, Indiana. It was also stipulated in the contract that the president of the Eagle Cotton Mills Company of Pittsburgh should be elected a director and president of the Madison corporation, and that a Mr. Townsend should act as secretary for the last named company, at a stipulated salary. This agreement was ratified on the day on which it was executed by the votes of those holding a majority of the shares of stock, at a stockholders' meeting regularly called. A location was obtained, mills erected and put in successful operation at Madison, Indiana. It is found that the defendant's subscription was accepted by the corporation, and that after the contract between the two corporations had been executed, but before it was ratified, the defendant gave notice to the plaintiff's board of directors that he withdrew his name from the subscription as a stockholder. The de-

Cravens v. The Eagle Cotton Mills Company.

defendant refused to pay any part of his subscription. The facts found and the conclusions of law thereon stated by the court, formed the basis of a judgment in favor of the plaintiff for the full amount of the subscription, with interest.

On the appellant's behalf it is contended that the contract of subscription was subject to two conditions precedent, viz.: "1. That \$125,000 of solvent subscriptions, including \$60,000 promised by the Eagle Cotton Mills Company of Pittsburgh, Pennsylvania, should be obtained; and 2. That the contract with the above named company for the purchase of its mills should be ratified by the votes of those holding a majority of the capital stock."

Conceding that the first condition had been fully performed, the appellant's position, as we understand it, is, that the second condition had not been performed, because the contract entered into with the Pittsburgh corporation, and ratified by the vote of the stockholders of the plaintiff corporation, was not the one made or contemplated by the parties and referred to in the contract of subscription, and that the defendant had, therefore, the right to withdraw his name as a subscriber. Moreover, it is said that the contract between the two corporations was, for various reasons, *ultra vires*, and void.

The court found that the contract which the stockholders of the Madison corporation ratified was not made until after the stock was all subscribed; that an arrangement of some kind was under contemplation at the time, but had not been definitely agreed upon, and that there was, in fact, no contract between the two corporations when the subscription was made.

The appellant assumes that the written contract of subscription shows that a definite contract existed for the purchase of the Pittsburgh company's mills at the time the subscriptions were made; that he subscribed for stock with reference to that contract, and that the finding of the court that there was no contract, rests upon a violation of the rule which

Cravens v. The Eagle Cotton Mills Company.

declares that parol evidence will not be heard to explain, modify, or contradict a written contract. This assumption is not warranted by the terms of the writing. While it is quite apparent that an arrangement of some kind was under contemplation at the time the subscriptions for stock were made, whereby the Eagle Cotton Mills Co. of Pittsburgh, might subscribe for \$60,000 stock in the Madison corporation, and sell its mills to the latter, the plain inference is, that the final contract to that end had not yet been consummated. If a contract for the purchase of the mills had actually been executed, it would have been worse than idle to stipulate that no subscriptions to the stock should be collectible until after the contract had been ratified by a majority of the stockholders. It can hardly be conceived as possible that a contract was first made whereby the new corporation became bound to purchase the mills of the old, and that subscriptions for stock were afterwards taken subject to the condition that if the stockholders refused to ratify the contract, the subscriptions were to become uncollectible. The rule that a formal written contract, which appears upon its face to be complete, can not be enlarged, modified, or contradicted, by proof of prior or contemporaneous parol negotiations or agreements, is abundantly settled, and receives the fullest recognition in the decisions of this court. *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334; *Carr v. Hays*, 110 Ind. 408; *Tucker v. Tucker*, 113 Ind. 272.

It is equally well settled, however, that the first duty of the court in interpreting a contract is to discover the intention of the parties, and while that must be done solely by considering the meaning of the language employed in the instrument, yet when the terms employed are susceptible of more than one meaning, it is the duty of the court, not only to regard the nature of the instrument, but also to inform itself of the circumstances which surrounded the parties at the time, so as to interpret the language employed from the standpoint which the parties occupied when they executed

Cravens v. The Eagle Cotton Mills Company.

the contract. *Daugherty v. Rogers*, 119 Ind. 254, and cases cited; *Heath v. West*, 68 Ind. 548; *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515; *Nash v. Towne*, 5 Wall. 689; *Scott v. United States*, 12 Wall. 443; *Canal Co. v. Hill*, 15 Wall. 94; *Reed v. Insurance Co.*, 95 U. S. 23; *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597.

If the words of the instrument are clear in themselves, it must be construed accordingly, but if they are susceptible of more meanings than one, the court must avail itself of the light enjoyed by the parties when the contract was executed, so as to arrive at the meaning of the words, and give them a correct application to the persons and things described. *Springsteen v. Samson*, 32 N. Y. 703. Where the language employed admits of more than one construction, one of which renders the contract insensible, that construction will be adopted which will give effect to the contract; and, in cases of doubt, the practical construction which the parties themselves have given it will be of great, if not controlling, influence. *Reissner v. Oxley*, 80 Ind. 580; *Lyles v. Lescher*, 108 Ind. 382, and cases cited; *Chicago v. Sheldon*, 9 Wall. 50.

The relations existing between the Pittsburgh corporation and the plaintiff at the time the appellant subscribed for stock, were matters collateral to the contract of subscription, and in no manner affected, or entered into, the contract of the latter with the plaintiff. *Singer Mfg. Co. v. Forsyth*, *supra*; *Eighmie v. Taylor*, 98 N. Y. 288.

It was essential, however, in order that the contract of subscription might be intelligently applied to the collateral matters therein referred to, that the court should be informed of the relations existing between the two corporations at the time the subscription was made. It was therefore competent for the plaintiff, when the appellant claimed exoneration from his subscription on the ground that the contract between the two companies, in respect to the amount of stock which the Pittsburgh company had agreed to subscribe, or

Cravens v. The Eagle Cotton Mills Company.

the terms upon which it had agreed to sell its mills, had been changed, or that the agreement had been varied in any other respect, to show that no contract had, in fact, been consummated, and that the situation of the parties was such as to make it apparent that the contract referred to was one that might possibly be made in the future. This in no way tended to alter or modify the contract of subscription, but to give it intelligent application to the collateral matters to which it referred.

It is contended that one corporation can not sell its property and good-will to another, and that the agreement that the president of the one should be elected a director and president of the other, was invalid, and that the whole contract was therefore *ultra vires*. We do not deem it necessary to enter upon an examination of these questions. In the view we take, the stipulation in the contract of subscription by which the amounts subscribed were not to become payable until the contract for the purchase of the mills had been ratified, was in no sense a condition precedent to the liability of the subscribers for stock. As we have seen, that stipulation had reference to a matter wholly aside from, and collateral to, the contract of subscription. It was essentially an independent covenant, by which it was, in effect, agreed that no contract should be finally made for the purchase of the Pittsburgh company's mills without the consent of the majority of the stockholders. The Madison corporation in no way bound itself to purchase the cotton mills owned by the Pittsburgh company, nor was its absolute right to collect its stock subscriptions in any way conditioned upon the future purchase of those mills. If the Pittsburgh mills had never been purchased, or if after the contract of purchase was negotiated, it had been rejected by the stockholders, it would hardly be maintainable that the Madison corporation would have thereby lost its right to enforce payment of its stock subscriptions in order to carry out the purpose for which the corporation was organized. To give the contract

 Cravens v. The Eagle Cotton Mills Company.

the construction contended for would enable the subscribers to withdraw all their subscriptions, and deprive the corporation of its capital to such an extent as to disable it from conducting its business. *Pittsburgh, etc., R. R. Co. v. Biggar*, 34 Pa. St. 455; *Boyd v. Peach Bottom R. W. Co.*, 90 Pa. St. 169; *Morawetz Corp.*, sections 92, 93.

Since it was not made a condition precedent to the appellant's liability that a contract with the Pittsburgh corporation of a specified character should first be made, he can not now defeat the collection of his subscription by assailing the contract that actually was made. He was content that the board of directors should exercise their best judgment in obtaining and agreeing upon terms of purchase, with the stipulation that his subscription should not become payable until the contract of purchase, if one was agreed upon, was ratified by a majority of the stockholders. This the court finds has been fairly done, and it is now too late to assail the contract in an action to collect the subscription price of stock. Thus it has been said:

"A subscriber for stock in a corporation can not defeat an action to collect such subscription by the defence that the directors or the corporation itself have done corporate acts which are beyond the corporate powers. There are other remedies open to the subscriber. He may either impair such *ultra vires* acts, or may have them set aside if already accomplished. * * * Thus it has been held that a subscriber can not defeat an action to collect his subscription by showing that the corporation has, without authority of law, and in excess of its powers, executed a lease or sale of the road; or illegally issued its bonds; or purchased shares of its own stock, or of another corporation; or changed the location or route of the road. The last instance especially, has been a frequent defence, but has been uniformly discountenanced by the courts whenever the change is made, not by an amendment to the charter, but by the arbitrary, unauthorized act of the corporate authorities. * * *

Cravens v. The Eagle Cotton Mills Company.

"A stockholder can not defeat an action to collect his subscription by the defence that the corporate affairs have been managed fraudulently, or recklessly or negligently. The stockholder's remedy for such evils is of a different nature. For fraud, he may bring the guilty parties to an accounting. For mismanagement, his only remedy is the corporate elections. In no case has he been allowed to escape liability on his subscription by reason thereof. Thus it is no defence that the corporate authorities fraudulently placed an overvaluation on property purchased by them for the corporation; nor that they made a fraudulent contract with a construction company." *Cook Stock and Stockholders*, sections 187, 188; *1 Wood Railway Law*, sections 43, 45.

These subscriptions are made to take stock in an existing or proposed corporation, upon a condition precedent, as for example, upon condition that a specified amount of subscriptions should thereafter be obtained. The contract of the several subscribers is two-fold in character. It is, in a sense, a contract between the several subscribers which can not be withdrawn or revoked as to any one without the acquiescence of all. It is also a continuing offer or proposition to the corporation to take and pay for the amount of stock subscribed, upon the terms proposed, whenever the specified amount of subscriptions shall have been obtained. The obtaining of the amount specified within a reasonable time is an acceptance of the proposition or offer by the corporation, and the contract of each subscriber then becomes absolute and unconditional. *Minneapolis, etc., Co. v. Davis*, 41 N. W. Rep. (Minn.) 1026; *Morawetz Corp.*, section 47. A subscriber can not withdraw his subscription, even though it be conditional, unless unreasonable delay occurs in performing the condition. *Johnson v. Wabash, etc., Plank-Road Co.*, 16 Ind. 389; *Lake Ontario, etc., R. R. Co. v. Mason*, 16 N. Y. 451; *McClure v. Peoples', etc., R. W. Co.*, 90 Pa. St. 269.

When the plaintiff obtained solvent subscriptions for the amount specified, that became an effectual acceptance of the

Cravens v. The Eagle Cotton Mills Company.

offer of all those who had previously subscribed. Their subscriptions were no longer conditional, but they then became absolute, and were thereafter payable according to the terms of the contract on the call of the board of directors. *New Albany, etc., R. R. Co. v. Pickens*, 5 Ind. 247; *Esteel v. Knightstown, etc., Co.*, 41 Ind. 174; *Beckner v. Riverside, etc., Co.*, 65 Ind. 468; *Phoenix, etc., Co. v. Badger*, 67 N. Y. 294, 300. The subscribers thereupon became entitled to all the rights and privileges of stockholders, and they came under the correlative obligations and duties of holders of stock in a corporation. *Butler University v. Scoonover*, 114 Ind. 381; (5 Am. St. Rep. 627).

Questions of minor importance, involving the right of the plaintiff corporation to prosecute the suit in its own name, its power to make by-laws, and whether or not it was fully organized when the subscription in question was made, are presented in the briefs. It is sufficient to say, while these questions in no way affect the merits, we have considered them, and find no error in the record. Both parties having by entering into the contract sued on assumed the existence of the corporation, both are now estopped from denying it. *Whitney v. Wyman*, 101 U. S. 392.

The judgment is therefore affirmed, with costs.

BERKSHIRE, J., did not participate in the decision of this case.

Filed June 19, 1889; petition for rehearing overruled Sept. 20, 1889.

Langsdale v. Woollen, Administrator.

No. 14,655.

LANGSDALE v. WOOLLEN, ADMINISTRATOR.

PLEADING.—*Complaint to Recover Real Estate.—Damages.—Misjoinder.*—It is not a misjoinder to join in the same complaint a paragraph seeking to recover the possession of real estate with another claiming damages for its detention.

SAME.—*Misjoinder.—Question of, How Raised.*—The only way to raise the question of a misjoinder of causes of action is by demurrer, and it is not error for the lower court to overrule a motion to docket separately the different paragraphs of complaint, as independent actions, on the ground of misjoinder.

SUPREME COURT.—*Error in Overruling Demurrer for Misjoinder.—Judgment not Reversed for.*—The Supreme Court will not reverse a judgment for error committed in sustaining or overruling a demurrer for misjoinder of causes of action.

REAL ESTATE.—*Title to.—Circuit Court.—Judgment of.—Sheriff's Sale.*—The judgment of the circuit court showing jurisdiction of the person and subject-matter, and valid on its face, is *prima facie* sufficient to support a sheriff's sale and title to real estate claimed under it.

From the Marion Superior Court.

*J. M. Winters, R. Denny and J. R. McFee, for appellant.
H. Dailey and W. V. Rooker, for appellee.*

BERKSHIRE, J.—This is an action to recover the possession of certain real estate in the city of Indianapolis, together with damages for its detention. The case was tried at special term, a judgment rendered for the appellee, an appeal taken to general term at which the judgment at special term was affirmed, with a modification as to the amount of damages, and this appeal is from the judgment at general term.

Several errors are assigned, to which we need not call special attention, but will consider the several questions discussed by appellant's counsel.

There are three paragraphs in the complaint. By the first and third paragraphs the appellee seeks to recover the pos-

180	16
188	347
120	16
162	18.
120	16
165	283

Langsdale v. Woollen, Administrator.

session of the real estate, together with damages on account of the detention thereof. The second paragraph is for the recovery of damages only for the use and occupation of the real estate.

There were demurrers filed to the complaint, and to the several paragraphs of the complaint. The cause of demurrer to the complaint was a misjoinder of causes of action; the cause of demurrer to the several paragraphs was want of facts sufficient to constitute a cause of action.

The appellant also filed a motion asking the court to require the several paragraphs of complaint to be docketed as independent actions, on the ground of misjoinder. In an action to recover the possession of real property, the plaintiff, if entitled to recover the possession, is also entitled to recover with it damages sustained because of being deprived of the possession. R. S. 1881, sections 1058, 1061.

Rents and profits are recoverable for a period of six years anterior to the commencement of the action, and down to the date at which the action is terminated. Section 1058, *supra*.

The cause of action averred in the second paragraph is to recover rents and profits for the use and occupation of the same real estate named in the first and third paragraphs of the complaint, and covering the same period of time stated in those paragraphs.

The cause of action pleaded in the second paragraph is fully covered by the other paragraphs, but if not it might have been, and as it is or might have been included in the paragraphs for possession, we can not very well see how it can be said that there is a misjoinder when joined with the other paragraphs in a separate paragraph; if there is no misjoinder when included in the same paragraph, there can be no misjoinder when pleaded in a separate paragraph. Pomeroy Rem. Rights, section 494.

But if it were conceded that the court erred in overruling

Langsdale v. Woollen, Administrator.

the demurrer there would be no available error, for it is expressly provided by statute that no judgment shall be reversed for error committed in sustaining or overruling a demurrer for misjoinder of causes of action. R. S. 1881, section 341; *Miller v. Evansville Nat'l Bank*, 99 Ind. 272; *Pittsburgh, etc., R. R. Co. v. Swinney*, 97 Ind. 586; *Coan v. Grimes*, 63 Ind. 21.

The only proper way to raise the question of a misjoinder of causes of action is by demurrer. R. S. 1881, section 343; *Buskirk* Pr. 170; *Rutherford v. Moore*, 24 Ind. 311.

The court, therefore, committed no error in overruling the motion to separately docket the different paragraphs of complaint.

The first paragraph of the complaint is a paragraph in the ordinary form, and contains all of the substantive as well as formal averments necessary to a good cause of action.

The third paragraph is more specific, but shows the appellee to be the owner of the real estate in controversy and entitled to the possession, and a wrongful detention of the property by the appellant. These paragraphs are entirely sufficient, and the demurrers were rightfully overruled. R. S. 1881, section 1054.

The second paragraph avers an indebtedness due and unpaid from the appellant to the appellee for the use and occupation of the real estate, and states a good cause of action; but if there had been error in overruling the demurrer it would have been unavailing, for the same matter was provable under the other paragraphs of the complaint.

The appellee claimed title to the real estate under a sheriff's deed. The appellant being the judgment debtor, the appellee was only required to prove a valid judgment, an execution, a sale and a sheriff's deed. *Woollen v. Rockefeller*, 81 Ind. 208; *Rucker v. Steelman*, 73 Ind. 396; *Leary v. New*, 90 Ind. 502.

The judgment relied upon to support the appellee's title is a judgment rendered in the Hamilton Circuit Court, which

Sites v. Miller *et al.*

is a court of general jurisdiction. Where the record of a court of general jurisdiction is silent upon the subject, jurisdiction will be presumed. *Pickering v. State*, 106 Ind. 228; *Iles v. Watson*, 76 Ind. 359; *McCormick v. Webster*, 89 Ind. 105; *Sims v. Gay*, 109 Ind. 501; *Walker v. Hill*, 111 Ind. 223; *Coan v. Clow*, 83 Ind. 417.

But the record of the judgment under consideration shows affirmatively jurisdiction over the person as well as the subject matter, and is probably conclusive as against collateral attack; but as it is not necessary to pass upon that question, we do not do so. The judgment of the Hamilton Circuit Court is a valid judgment on its face, and is *prima facie* sufficient to support the sheriff's sale. *Woolen v. Rockefeller*, *supra*; *Lantz v. Maffett*, 102 Ind. 23; *Turner v. First Nat'l Bank*, 78 Ind. 19.

We have considered all questions arising in the record to which counsel for the appellant give attention in their brief, and find no error.

Judgment affirmed, with costs.

Filed May 28, 1889; petition for a rehearing overruled Sept. 24, 1889.

No. 13,842.

SITES v. MILLER ET AL.

DRAINAGE.—*Act of 1883.*—*Notice.*—The notice required by the drainage act of 1883 must follow, and not precede, the filing of the petition, and where the notice is that the petition *will* be filed at the next term of court, it is not sufficient, and the proceedings may be dismissed upon the motion of one who has not submitted to the jurisdiction of the court.

Sites v. Miller *et al.*

SAME.—*Refusal to Give Further Notice.—Dismissal of Petition.—Bill of Exceptions.—Practice.*—No question is presented on appeal as to the action of the trial court in dismissing a petition for drainage, upon the refusal of the petitioner to give further notice of the filing of the petition, unless it is preserved by a bill of exceptions.

From the Franklin Circuit Court.

J. F. McKee, D. W. McKee, F. Berry and H. Berry, Jr., for appellant.

S. E. Urmston, I. Carter, W. H. Jones and C. F. Jones, for appellees.

OLDS, J.—This is a proceeding for the drainage of certain real estate, under the drainage act of 1883. The original petition was filed on the 16th day of April, 1884, and on the 17th day of September, 1884, an amended petition was filed. At the November term, 1884, of said court, proof of posting notices was filed, and the court ordered the cause docketed as an action pending, and referred the petition to the commissioners of drainage, with orders to report on a day named. The commissioners made report, which included lands not named in the petition, and notice was given to the owners of the lands included in the report, and not included in the petition. At the April term, 1885, the commissioners of drainage filed an amended report. One Robert Darr, whose lands were reported as benefited, remonstrated, and there was a trial and finding in favor of Darr on his remonstrance, and the petition again referred to the commissioners of drainage, and an order was finally made for the commissioners to report on the first day of the February term, 1886; they failed to report upon that day, and on the second day of said term the petitioners filed a petition stating the reasons for the failure of the commissioners to report, and the time was extended. Various steps were taken, and finally a report was filed by the commissioners. Some of the persons whose lands were assessed made special appearances, and moved to set aside the report, and without their motions being passed upon appeared and filed remonstrances.

Sites v. Miller *et al.*

The appellee Lafayette M. Hetrick, whose lands were described in the petition and reported as benefited, made a special appearance and filed his written motion to set aside the report of the commissioners of drainage and the notice, and to dismiss the proceedings, stating, among other reasons for the setting aside of the report and notice and the dismissal of the proceedings, that no notice had been given of the filing and pendency of the petition as required by the act of 1883, and that the only notice which had been given by said petitioner in said cause was a notice stating that "at the next term of the Franklin County Circuit Court the said Sites would petition said court for the drainage of certain real estate," describing it, "and that a large number of the persons whose lands were affected by such drainage had not appeared to said petition, and had in no way submitted to the jurisdiction of said court." The court sustained the motion of said Hetrick, and made a finding that the "material allegations set forth in said motion are true, and that all of the notices concerning the filing of the petition in this cause were that the petitioner would file a petition at the next term of the Franklin Circuit Court, and not that he had filed his petition;" and the court ordered "that the order of the court docketing this cause as an action pending in said court, and the order referring said petition to the commissioners of drainage, and the report of said commissioners, be set aside and held for naught;" to which ruling of the court in sustaining said motion appellant excepted and assigns the same as error. Hetrick had not waived notice in this case; the first step taken by him was his special appearance and motion to dismiss, on the grounds of the insufficiency of the notice. The case of *McMullen v. State, ex rel.*, 105 Ind. 334, is decisive of the question in this case. The motion of Hetrick was properly sustained.

- The record shows that after the court sustained the motion of Hetrick, and at a subsequent term of the court, the petitioner appeared in court and notified the court that he would

Sites v. Miller et al.

not give any further notice of the filing of the petition, and refused to give any further notice of the filing of such petition, whereupon the court, on its own motion, dismissed the cause and petition at the costs of the petitioner, to which action of the court the petitioner objected and excepted.

Counsel for appellant contend that as some of the parties whose lands were affected by the proposed drainage had appeared and filed remonstrances, they had thereby waived notice, and that the action of the court in dismissing the proceedings as to such persons who had waived notice was erroneous, but this question is not properly presented to this court. To review the action of the lower court in the dismissal of the cause upon the refusal of the petitioners to give further notice of the filing of the petition, it was necessary to preserve the question by bill of exceptions. While many questions are presented by the bill of exceptions, this question is omitted. *Pennsylvania Co. v. Niblack*, 99 Ind. 149.

The case as presented to this court shows this state of facts: The petitioner filed his petition for the drainage of certain real estate, but failed to give the proper notice of the pendency of the petition. The cause proceeded step by step until a final report was made and filed by the commissioners of drainage. A few of the parties interested appeared, and, without objecting to the notice, remonstrated, whereby they waived the giving of the proper notice of the filing of the petition. *Carr v. Boone*, 108 Ind. 241. At this stage of the proceedings, Hetrick, whose lands were described in the petition, entered a special appearance, and moved to set aside the notice and all proceedings subsequent thereto. The notice being insufficient, the court properly sustained his motion. The ruling of the court on the motion of Hetrick is properly presented by bill of exceptions.

At this stage of the case, in order to proceed further, as to those who had not waived service, at least, it was necessary that a further and proper notice of the filing of the petition should have been ordered and given. The petitioners

The State, *ex rel.* Hulman, *v.* Harper *et al.*

refused to give any further notice, and the court, on its own motion, dismissed the proceedings and petition, but there is no bill of exceptions presenting the question as to the action of the court in the dismissal of the cause, and the question as to the correctness of the ruling of the court in dismissing the petition as to those who had waived notice is not properly presented for the decision of this court.

Judgment affirmed, with costs.

Filed Sept. 17, 1889.

No. 13,863.

THE STATE, EX REL. HULMAN, *v.* HARPER ET AL.

EXECUTION.—*Insolvent Debtor.*—A debtor who has no property subject to execution is insolvent.

SAME.—*Exemption.*—*Lien.*—Where a debtor owns less property than he is entitled to claim as exempt from execution, such property is not subject to levy, and an execution does not become a lien thereon.

SAME.—*Sheriff.*—*Failure to Levy.*—*Exempt Property.*—A sheriff is not liable for failing to make a levy where the debtor owns no more property than he is entitled to claim as exempt from execution.

SAME.—*Presumption that Debtor will Claim Exemption.*—While the right to claim property as exempt is a personal privilege of the debtor, the law presumes that he will make such claim.

SAME.—*Tort.*—*Presumption.*—*Burden of Proof.*—In an action against a sheriff for failing to make a levy, it will not be presumed in favor of the plaintiff that his judgment was rendered in tort, but if such is the fact he must establish it.

From the Montgomery Circuit Court.

J. R. Courtney and *H. J. Baker*, for appellant.

J. Wright and *J. M. Seller*, for appellees.

120	23
135	357
120	23
146	596
120	23
148	433
150	414

Sites v. Miller et al.

not give any further notice of the filing of the petition, and refused to give any further notice of the filing of such petition, whereupon the court, on its own motion, dismissed the cause and petition at the costs of the petitioner, to which action of the court the petitioner objected and excepted.

Counsel for appellant contend that as some of the parties whose lands were affected by the proposed drainage had appeared and filed remonstrances, they had thereby waived notice, and that the action of the court in dismissing the proceedings as to such persons who had waived notice was erroneous, but this question is not properly presented to this court. To review the action of the lower court in the dismissal of the cause upon the refusal of the petitioners to give further notice of the filing of the petition, it was necessary to preserve the question by bill of exceptions. While many questions are presented by the bill of exceptions, this question is omitted. *Pennsylvania Co. v. Niblack*, 99 Ind. 149.

The case as presented to this court shows this state of facts: The petitioner filed his petition for the drainage of certain real estate, but failed to give the proper notice of the pendency of the petition. The cause proceeded step by step until a final report was made and filed by the commissioners of drainage. A few of the parties interested appeared, and, without objecting to the notice, remonstrated, whereby they waived the giving of the proper notice of the filing of the petition. *Carr v. Boone*, 108 Ind. 241. At this stage of the proceedings, Hetrick, whose lands were described in the petition, entered a special appearance, and moved to set aside the notice and all proceedings subsequent thereto. The notice being insufficient, the court properly sustained his motion. The ruling of the court on the motion of Hetrick is properly presented by bill of exceptions.

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The State, *ex rel.* Hulman, *v.* Harper *et al.*

refused to give any further notice, and the court, on its own motion, dismissed the proceedings and petition, but there is no bill of exceptions presenting the question as to the action of the court in the dismissal of the cause, and the question as to the correctness of the ruling of the court in dismissing the petition as to those who had waived notice is not properly presented for the decision of this court.

Judgment affirmed, with costs.

Filed Sept. 17, 1889.

No. 13,863.

THE STATE, EX REL. HULMAN, *v.* HARPER ET AL.

EXECUTION.—*Insolvent Debtor.*—A debtor who has no property subject to execution is insolvent.

SAME.—*Exemption.—Lien.*—Where a debtor owns less property than he is entitled to claim as exempt from execution, such property is not subject to levy, and an execution does not become a lien thereon.

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SAME.—*Presumption that Debtor will Claim Exemption.*—While the right to claim property as exempt is a personal privilege of the debtor, the law presumes that he will make such claim.

SAME.—*Tort.—Presumption.—Burden of Proof.*—In an action against a sheriff for failing to make a levy, it will not be presumed in favor of the plaintiff that his judgment was rendered in tort, but if such is the fact he must establish it.

From the Montgomery Circuit Court.

J. R. Courtney and *H. J. Baker*, for appellant.

J. Wright and *J. M. Seller*, for appellees.

130	23
135	357
120	23
146	596
120	23
148	438
150	414

The State, *ex rel.* Hulman, *v.* Harper *et al.*

COFFEY, J.—This was an action by the appellant against the appellee Alexander Harper, as the sheriff of Montgomery county, and the sureties on his official bond.

It appears, from the special finding of the facts in the case, that the appellant, Herman Hulman, recovered a judgment in the Montgomery Circuit Court, on the 15th day of December, 1884, for the sum of four hundred and sixty-seven dollars, against Howard Wilcox. On the 24th day of December, in the same year, he sued out an execution on said judgment, which came into the hands of the appellee Alexander Harper, as the sheriff of said county, on the same day; said sheriff failed to levy said execution, and permitted it to die in his hands. On the 27th day of June, 1885, the appellant sued out another execution on said judgment, which also came to the hands of the appellee Alexander Harper, as such sheriff, which he failed to levy, and he permitted this writ also to die in his hands. No part of the said judgment has ever been paid.

While said appellee held said writs he demanded of the execution defendant, Howard Wilcox, property to satisfy the same, but was informed by said debtor that he had no property whatever, and that the property which was being used by the said Wilcox and his partner in the saloon business was the property of Lydia Wilcox, the wife of the said Howard, and his partner; he was informed, however, by the appellant, during the life of said executions, that the undivided one-half of said property was owned by the said Howard Wilcox, and the same was pointed out by the appellant as subject to execution. Howard Wilcox, during all said time, was a resident householder of Montgomery county, Indiana, and during all said time was the owner of the undivided one-half of said property, the same being owned by him and another as partners in carrying on the saloon business, said property consisting of billiard and pool tables, safe, ice-box, side-bar, bar-glasses, decanters, stoves, tables, desk, pictures and furniture. The interest of said Howard Wil-

The State, *ex rel.* Hulman, *v.* Harper *et al.*

cox during all said time was worth five hundred dollars, and no more, and this was all the property owned by him. Howard Wilcox at all times disclaimed the ownership of said property, and the appellee Harper had no personal knowledge of the fact that he was the owner of the same at the time he held either of said executions.

Upon these facts the court stated as conclusions of law that said appellee and the sureties on his official bond were not liable to the appellant for failure to levy said executions, and the appellant excepted. He appeals to this court, and assigns as error:

First. That the circuit court erred in its conclusions of law upon the facts above stated.

Second. That the court erred in overruling the appellant's demurrer to the second and third paragraphs of the appellees' answer.

It is earnestly contended by the appellant that it was the duty of the sheriff to levy the execution in his hands upon the property of the execution debtor, regardless of the question as to whether it exceeded the amount exempt from execution. While, on the other hand, it is contended by the appellees that unless such debtor was the owner of property exceeding in value the amount exempt by law from levy and sale, he was insolvent, and that such insolvency constituted a legal excuse for making no levy.

The case of *State, ex rel., v. Neff*, 74 Ind. 146, was an action on a constable's bond for failure to levy an execution. It was held in that case that a general plea of the insolvency of the execution debtor was a bar to the action. The question, therefore, is, when is a debtor in legal contemplation insolvent?

A debtor who has no property subject to execution is insolvent. *Dick v. Hitt*, 82 Ind. 92; *Simpkins v. Smith*, 94 Ind. 470; *Williams v. Osborne*, 95 Ind. 347; *Williams v. Osbon*, 75 Ind. 280.

While it is true that the right to claim property as exempt

The State, *ex rel.* Hulman, *v.* Harper *et al.*

from execution is the personal privilege of the debtor, as such exemption is for his benefit, the law presumes that he will make such claim. *Campbell v. Gould*, 17 Ind. 133; *Williams v. Osbon*, *supra*.

It has been held repeatedly by this court that where a debtor owns less property than he is entitled to claim as exempt from execution, such property is not subject to levy, and an execution does not become a lien upon it, and that he may sell the same, or make such disposition thereof as he may choose, even while the execution remains in the hands of an officer: *Durbin v. Haines*, 99 Ind. 463; *Taylor v. Duesterberg*, 109 Ind. 165; *Barnard v. Brown*, 112 Ind. 53.

The command of an execution, for the collection of a debt, is that the sheriff shall levy the same of the property of the execution debtor subject to execution. R. S. 1881, section 682.

We think it follows from the authorities here cited, that where the execution debtor's property does not exceed the amount allowed by law as exempt from execution, the sheriff is not required to make a levy upon such property. Indeed, he could not do so without exceeding the commands of his writ. It is true that he would be liable to nominal damages for failing to return the execution within the time therein specified, but for a failure to levy upon property upon which his execution was not a lien, we are of the opinion that he is not liable.

It is claimed by the appellant that as it does not appear from the special finding that the judgment upon which the execution in this case issued was rendered upon a contract, we must presume that it was rendered for a tort.

We are not inclined to adopt this view. It was for the appellant to make out his case. When it was shown that the property of the execution defendant did not exceed six hundred dollars in value, we think it should have been shown by the appellant, if he desired to show a liability on the part of the sheriff, that the judgment was rendered in an action

Freed v. Mills.

not sounding in contract. The sheriff is presumed to have done his duty, and the burden rested upon the appellant to remove such presumption by proper proof.

What we have said here also disposes of the second assignment of error, as the answers set up the same matters here discussed.

There is no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed Sept. 17, 1889.

No. 13,756.**FREED v. MILLS.**

CONTRACT.—*Incomplete Instrument.*—*Averment of Extrinsic Facts.*—Jonah Freed executed an instrument of this tenor: "This is to certify that I have this day received a deed from Richard Mills and wife for certain real estate, in consideration of which I am to apply the payment thereof to a note that Henry G. Smith holds against Richard Mills, Peter Linn, D. F. Linn and Jonah Freed, for three hundred and seventy-five dollars." *Held*, in an action by Mills against Freed, that this instrument is not, on its face, a complete and enforceable contract, and to authorize a recovery extrinsic facts, giving it a legal effect, must be averred.

From the Lawrence Circuit Court.

G. W. Friedley, J. Giles and B. S. Lowe, for appellant.
S. B. Voyles and H. Morris, for appellee.

ELLIOTT, C. J.—The second and third paragraphs of the appellee's complaint are founded on the following instrument, viz: "This is to certify that I have this day received a deed from Richard Mills and wife for certain real estate,

Freed v. Mills.

in consideration of which I am to apply the payment thereof to a note that Henry G. Smith holds against Richard Mills, Peter Linn, D. F. Linn and Jonah Freed, for three hundred and seventy-five dollars, and interest.

(Signed) "JONAH FREED."

In both of the paragraphs mentioned it is alleged that the appellee was indebted to the appellant in the sum of \$375, and that the indebtedness was evidenced by a promissory note executed by the appellee as principal, and the other makers of the note as sureties; that the appellant did not pay the note, and the appellee was compelled to pay it.

The third paragraph of the complaint contains, in addition to the statements we have summarized, the following: That the parties entered into an agreement wherein it was stipulated that Mills should convey the land to Freed, in consideration that Freed would thereafter pay the note executed to Henry G. Smith by Mills and his sureties, and that Freed received a deed and took possession of the land.

It will be observed that neither of the paragraphs of the complaint avers that there was any mistake in reducing the agreement to writing, nor does either of them aver that the written instrument is not full and complete. We must, therefore, assume that the writing contains the contract of the parties, unless we find from an inspection that it is incomplete. If it is a complete contract, then it must be deemed the sole repository of the agreement between the parties, in which all preceding oral negotiations and agreements are merged. If it is not a complete and enforceable contract, then there can be no recovery upon it without the aid of extrinsic facts giving it a legal effect and vitality.

It is our judgment that the written instrument is not, on its face, a complete and enforceable one. There is no undertaking on the part of Freed to pay the note executed to Smith. He does not agree that he will pay the note, but that "he will apply the payment thereof to a note that Henry G. Smith holds." Granting, for the present, that the

Freed v. Mills.

language employed binds the appellant to apply the value of the land to the payment of the note, he will not be liable unless the value of the land is directly averred as a traversable fact. The word "apply" precludes the conclusion that there was a direct or absolute promise to pay the note. The utmost that can be conceded the appellee is that the writing binds the appellant to apply the value of the land to the payment of the note described in the instrument. There are, at all events, no words binding the appellant to pay off the note, nor are there words of assumption. If liable at all upon the face of the writing he is liable because he has not made the application of the value of the land, and not upon any agreement assuming the payment of the note. Even upon the concession we have provisionally made, there can be no recovery upon the theory embodied in the complaint, for that treats the writing as binding the appellant to pay the note executed by the appellee and his sureties.

But it is evident that the contract is not perfect in itself, for to give the words their ordinary meaning would leave the writing without effect. Taking the words of the writing, the promise of the appellee is "to apply the payment thereof to the payment of a note Henry G. Smith holds," and these words in themselves can have no force, since it is obvious that the appellant could not apply the payment to the note, although he might so apply the value of the land or the consideration agreed to be paid for it. Doubtless extrinsic facts may be averred which will give force to the contract, but without them it is ineffective.

As both the second and third paragraphs of the complaint were separately demurred to, and as they are insufficient, it is unnecessary to consider the question of the sufficiency of the answers.

Judgment reversed.

Filed Sept. 18, 1889.

The Continental Insurance Company v. Munns.

No. 13,792.

THE CONTINENTAL INSURANCE COMPANY v. MUNNS.

INSURANCE.—*Sale of Insured Property.*—*Assignment of Policy.*—Upon a sale and transfer of property covered by a policy of insurance, and an assignment of the policy to the purchaser, duly assented to by the insurance company, a new and original contract of indemnity arises between the company and the assignee, which the latter may enforce without regard to what may have occurred prior to the assignment.

SAME.—*Encumbrances.*—*Forfeiture by Assignor.*—*Rights of Assignee.*—Where the owner of insured property mortgages it, without notice to the insurer and in violation of a condition in the policy, after which he sells the property and assigns the policy to the purchaser, who obtains the assent of the insurer to the assignment, the latter at the time of giving its assent having no actual knowledge of the mortgage, the insurer can not set up the previous forfeiture by the assignor to defeat an action by the assignee.

SAME.—*Inquiry as to Encumbrances.*—An applicant for insurance is not bound, unless inquired of, to disclose whether or not the property insured is encumbered.

From the Montgomery Circuit Court.

B. Crane and A. B. Anderson, for appellant.

H. H. Dochterman, for appellee.

MITCHELL, J.—This is an appeal from a judgment rendered by the Montgomery Circuit Court in favor of William Munns against the Continental Insurance Company. The questions for decision arise upon the following facts: On January 17th, 1883, the insurance company above named delivered to John Bittle a policy of insurance, by which it insured his dwelling-house and its contents, consisting of household furniture, etc., his barn, shed and granary, and their contents, severally, consisting of farming utensils, wagons, carriages, grain, horses, etc., for a period of five years for a gross premium of \$37.

At the time the policy was issued Bittle owned the farm

120	30
126	411

120	30
153	118

120	30
163	57

20	30
64	186

120	30
e167	705

The Continental Insurance Company v. Munns.

upon which the several buildings insured were situate, and the personal property covered by the policy was in the buildings therein described, the insurance being apportioned in specified sums upon the several buildings and the property therein situate.

The policy contained a stipulation of the following purport: "If the applicant shall mortgage, or otherwise encumber the property hereby insured, without notice to and consent of the company endorsed hereon, this policy shall become null and void." On the 27th day of June, 1885, Bittle, without notice to the company, and without its knowledge or consent, mortgaged the farm upon which the house, barn and other buildings insured were situate, to the Provident Life and Trust Company of Philadelphia, to secure a loan of \$5,000. In the month of September following, he sold and conveyed the land, with the buildings thereon, to William Munns, for the consideration of \$12,000, and in a few days thereafter, without any new consideration, transferred the policy of insurance to the purchaser. The latter soon afterwards presented the policy to the company's general superintendent, who endorsed its consent thereon that the policy might be assigned to the purchaser, subject to all the terms and conditions mentioned or referred to therein. The company had no notice or knowledge of the existence of the mortgage at the time it gave its consent to the transfer of the policy. On July 27th, 1886, the barn, shed and granary, and their contents, were consumed by fire, entailing a loss amounting to \$1,700. After the destruction of the property, the company learned of the mortgage executed by Bittle, when it refused payment of the loss, on the ground that placing the encumbrance above mentioned on the property was a violation of the condition of the policy, which rendered it null and void.

Whether the judgment shall be affirmed or reversed depends upon whether or not the company can avail itself of the default of Bittle in an action on the policy by the plain-

The Continental Insurance Company v. Munns.

tiff. It must be assumed, as a matter of course, that the latter, when he purchased the farm and took an assignment of the insurance policy, had knowledge of the mortgage on the land, and of the condition relating to encumbrances in the policy.

Imputing to him knowledge of these facts, the question remains, did he take the policy strictly as assignee, subject to all the infirmities, defences, or any forfeiture which the laches or default of the assignor may have imposed upon it? or did the assignment, with the consent of the company, constitute the policy in effect a new and original contract between the latter and the assignee, unaffected by any previous forfeiture that may have occurred? If the transfer of the policy simply substituted the assignee to the rights which the assignor then had in the contract, it may well be said that if the latter had no rights by reason of the forfeiture which occurred prior to the assignment, the mere transfer conferred no new rights on the assignee. If, on the other hand, the assignment of the policy, with the assent of the company, constitutes a new, original and independent contract between the assignee and the insurer, then it is quite clear that no act of forfeiture committed by the assignor before the sale, assignment and consent is available against the policy in the hands of the purchaser newly insured.

A contract of insurance is purely a personal engagement, by which the insurer, for a consideration paid, agrees to indemnify the person insured against loss arising from damage to his property by fire. The contract appertains to the person with whom it is made, and does not run with the property insured. *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535 (5 Am. St. Rep. 27); *Cummings v. Cheshire, etc., Ins. Co.*, 55 N. H. 457.

It is abundantly settled that upon a sale and transfer of property covered by a policy of insurance, and an assignment of the policy to the purchaser, duly assented to by the company, a new and original contract of indemnity arises between the insurance company and the assignee, which the

The Continental Insurance Company v. Munns.

latter may enforce without regard to what may have occurred prior to the assignment. The policy, it is said, in such a case, expires with the transfer of the estate, so far as it relates to the original holder, but the assignment and assent of the company thereto constitute an independent contract with the purchaser and assignee, the same in effect as if the policy had been reissued to him upon the terms and conditions therein expressed. *Wilson v. Hill*, 3 Metc. 66; *Fogg v. Middlesex, etc., Ins. Co.*, 10 Cush. 337; *Flanagan v. Camden, etc., Ins. Co.*, 1 Dutch. (N. J.) 506; *Cummings v. Cheshire, etc., Ins. Co.*, 55 N. H. 457; *Steen v. Niagara, etc., Ins. Co.*, 89 N. Y. 315; *Shearman v. Niagara, etc., Ins. Co.*, 46 N. Y. 526; *Hooper v. Hudson River, etc., Ins. Co.*, 17 N. Y. 424; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; Wood Insurance, sections 110, 366.

Where an estate is sold and the policy transferred to the purchaser, and upon notice to the insurer he assents to it, a new and original contract of indemnity arises to the assignee, which he may enforce in his own name. The policy in such case expires with the transfer of the title to the estate, but the assent of the insurer to the assignment of the policy constitutes a new contract. *Pratt v. New York, etc., Ins. Co.*, 64 Barb. 589; *Flanders Fire Ins.*, 412, 484; *Foster v. Equitable, etc., Ins. Co.*, 2 Gray, 216.

Aside from the prohibitory clause, policies of insurance, prior to any loss, are not, in their nature, assignable from one person to another without the express consent of the insurance company issuing them. They are therefore subject to the common-law rule, the effect of which is, that where the assignee of a contract gives notice of the assignment to the other party to the instrument, and the latter assents to it, the transaction constitutes a new engagement between one of the parties to the contract and the assignee of the other, the terms of which are regulated and fixed by the original contract. *Fogg v. Middlesex, etc., Ins.*

The Continental Insurance Company v. Munns.

Co., supra; Wilson v. Hill, supra; Hooper v. Hudson River, etc., Ins. Co., supra; Flanders Insurance, 484.

In order that a policy of insurance may be effectual, the insured must have an interest in the property covered by the contract of insurance, not only when the contract is entered into, but when the loss occurs. If the interest in the property and the interest in the policy become separated, the operation of the policy becomes suspended, and if a loss occurs while the policy is thus suspended, no recovery can be had. An assignment of an insurance policy without a transfer of the property insured, would be an idle ceremony so far as transferring to the assignee any beneficial interest in the contract. On the other hand, the transfer of the property insured suspends the operation of the policy, which becomes inoperative for want of a subject-matter to act upon, until by the assignment and assent of the company a new contract of insurance, embodying the same terms and conditions as the old, arises between the latter and the purchaser. The contract of insurance thus consummated arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued embracing the terms of the old. In such a case no defence predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act, or permits a condition of things to exist in violation of the terms of the policy, he is not in default. *Ellis v. State Ins. Co.*, 68 Iowa, 578 (56 Am. R. 865), and *Insurance Co. v. Garland*, 108 Ill. 220, are not opposed to the conclusions above stated.

The case first cited involved a policy which contained a provision that "if the title of the property is * * * encumbered * * this policy shall be void." At the time the policy was assigned there was a mortgage on the property which remained upon it until after the loss. This condition, as the court well says, pertained to the character of the risk as it then was or should thereafter be, and when the assignee

The Continental Insurance Company v. Munns.

became a party to the condition he virtually agreed that if there was then or should thereafter be an encumbrance on the property; he should not in case of loss be entitled to recover.

The contract provided against subsisting encumbrances as fully as it did against those which might be made thereafter, and the gist of the defence which the court sustained was that the encumbrance was allowed to remain. The court fully recognized the doctrine of its former decisions, which hold that an assignment of a policy with the assent of the insurance company creates a new contract, and that the assignee is not affected by the acts of the assignor.

The other case relied upon was predicated upon a policy which contained a stipulation to the effect that if "the assured shall allow the buildings herein insured to become vacant or unoccupied, and so remain, * * * this policy shall become void." It was properly held that this provision was imported into the new contract, and became a present agreement with the assignee, and that as he permitted the premises to remain unoccupied the company had the right to avoid the policy because he had violated his agreement. The distinction between the cases relied on and the present case is obvious. In those cases the defences were not predicated upon acts or defaults of the vendor, but upon violations of the terms of the policy by the vendee himself. The policy involved in the present case contained no provision against subsisting encumbrances. Future encumbrances alone were referred to, and the established rule is that conditions which create forfeitures will not be extended by construction. *Northwestern, etc., Ins. Co. v. Hazelett*, 105 Ind. 212; *Symonds v. Northwestern, etc., Ins. Co.*, 23 Minn. 491.

There is no pretence that the assignee made any misrepresentation concerning the condition of the risk at the time the company gave its assent to the assignment. The rule applicable is that a failure or neglect on the part of the insured to make known facts which the insurer may regard as ma-

The Continental Insurance Company v. Munns.

terial to the risk, is not a breach of a condition in the policy, avoiding it in case of any omission to make known every fact material thereto, because the insured has a right to suppose that the insurer will make proper inquiries concerning all facts except such as are supposed to be known, or are regarded as immaterial. *Short v. Home Ins. Co.*, 90 N. Y. 16; *Burritt v. Saratoga, etc., Ins. Co.*, 5 Hill, 188; *Clark v. Manufacturers' Ins. Co.*, 8 How. 235.

In the case last cited the court said: "As to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak."

An applicant for insurance is not bound, unless inquired of, to disclose whether or not the property insured is encumbered. As the public records usually give information in reference to such matters, he may assume that the insurer knew of any existing encumbrances, or deemed it immaterial whether or not the property was encumbered.

These conclusions lead to an affirmance of the judgment. Judgment affirmed, with costs. *W*

Filed Sept. 17, 1889. *h*

Levy et al. v. Chittenden et al.

No. 13,202.

LEVY ET AL. v. CHITTENDEN ET AL.

PLEADING.—*Amendment.*—*Chattel Mortgage.*—*Creditor's Bill.*—Where a complaint seeks to set aside chattel mortgages and subject the mortgaged property to sale to pay judgments held by the plaintiff against the mortgagor, an amendment to the effect that the mortgagor had been permitted to retain possession of the property and dispose of a part of the same, does not change the cause of action, and it is not error to allow such amendment to be made after the evidence is heard, in order to conform the complaint thereto.

CHATTEL MORTGAGE.—*Fraud.*—*Satisfaction.*—*Theory of Action.*—*Judgment.*—Where the gravamen of an action by creditors is fraud in the execution of chattel mortgages by the debtor, a judgment for the plaintiffs ordering the mortgaged property to be sold in satisfaction of their claims, solely on the theory that the mortgages have been satisfied by the payment of the indebtedness which they were given to secure, is not authorized.

SAME.—*Sale.*—*Appraisalment.*—In such case, fraud not being found, it is error to order the mortgaged property to be sold without relief from valuation and appraisalment laws.

FINDING.—*Power of Court to Change after Entering of Record.*—After a finding has been announced and entered of record the power of the court over it is at an end, except that it may at any time before the close of the term at which judgment is rendered grant a new trial.

SAME.—*Character of.*—*Harmless Modification.*—All findings, which are not technically special findings, are regarded as general findings; and where facts are stated, an erroneous modification thereof on the motion of a party is harmless.

From the Elkhart Circuit Court.

J. H. Baker, J. H. Defrees, Jr., and F. E. Baker, for appellants.

J. M. Vanfleet, for appellees.

BERKSHIRE, J.—This was an action brought by the appellees, who were creditors of the appellant Fanny Levy, to subject to sale certain personal property in payment and satisfaction of certain judgments which they held against the

120	37
124	133
124	409
125	9
120	37
129	578
120	37
131	545
120	37
134	94
125	368
125	365
120	37
148	237
120	37
160	89
120	37
170	66

Levy et al. v. Chittenden et al.

said appellant. Judgment was rendered in the court below for the appellees, and the appellants appeal and assign error. In the complaint, as originally filed, it was alleged that the said appellant executed a mortgage upon said property to her co-appellant, Joseph Shackman, on the 16th day of September, 1884, to secure a pretended indebtedness, in the sum of \$1,850; and to her co-appellant, Jacob Goldberg, on the same day, a mortgage on said property to secure a pretended indebtedness, in the sum of \$750; and that on the 16th day of March, 1885, without foreclosure, the said personal property was sold to the appellant, Morris Herman, for the sum of \$1,200, who was a purchaser with notice, and that the money paid was furnished by the appellant Fanny, and was received and appropriated by the said appellant Shackman. The complaint contained other necessary and usual allegations found in a creditor's bill.

The appellants filed but one paragraph of answer, which was a general denial.

At the May term of the court the case was tried by the court, and continued under advisement.

On the 31st day of the October term, of the same year, the appellees moved the court for leave to file an amendment to their complaint in the words following: "That said mortgagor was left in possession of said goods, with the right to dispose of the same, and that she did sell and dispose of four thousand dollars worth of said goods, and did receive more than enough money to have paid and satisfied said mortgages before said mortgagees took possession of or sold said goods." The application for leave to make the amendment was supported by the following affidavit, omitting the formal parts:

"Come now the plaintiffs and move the court for permission to make the following amendment"—[here the proposed amendment is copied, which is the same as set out above.] "They ask to be allowed to make the amendment in order to make the pleadings conform to the proof already heard; they

Levy et al. v. Chittenden et al.

show that they are all non-residents, and were compelled to rely, and did rely, wholly on their attorney, J. M. Vanfleet, to look up the facts as well as the law in these matters, and that neither they nor he knew or had any means of discovering that enough goods had been sold by said mortgagor to pay said mortgages until the same was developed on the trial by the evidence; and they now aver that in their opinion the evidence already heard shows the truth of the allegations set forth in said proposed amendment, and that the same is necessary in order to allow justice to be done in this action."

The affidavit is verified by the attorney for the appellees, the appellants not being present in court. The appellants made no counter showing.

The court sustained the application, and allowed the amendment to be made, and the complaint as amended was then filed.

The appellants did not ask for a continuance, or for time to plead further because of the amendment, but reserved an exception, which is properly in the record.

After the amendment was made, the case was continued by the court on its own motion, and held under advisement until the fifth day of the March term, 1886, on which day a general finding was announced for the appellees, a personal judgment rendered against the appellants Shackman and Fanny Levy, without relief from valuation and appraisement laws, and a decree for the sale of the mortgaged property.

On the said fifth day of the March term, and after said judgment and decree was rendered, the appellants moved the court to modify the same, which motion was, on the forty-third day of said term of said court, overruled, and they reserved an exception, which appears properly in the record. On the fortieth day of said term of said court the appellees moved the court to modify its finding, and on the forty-third day of said term the court sustained said motion, and made the following record entry in reference thereto: "And the court now finds that all the material allegations of the

Levy *et al.* v. Chittenden *et al.*

amended complaint filed on the thirty-second judicial day of the October term, 1885, of said court, are true and proven; that the mortgages mentioned in the amended complaint had been paid and satisfied before the sale of goods thereon. It is therefore ordered and adjudged by the court now here that the finding and judgment of the court heretofore mentioned herein be and the same now is modified and changed, so as to read that the court finds for the plaintiffs solely on the allegations that the mortgages mentioned in the complaint had been paid and satisfied before sale of goods thereon."

To the modification of the finding as ordered by the court the appellants properly reserved an exception.

That justice may be done between the parties, our code is very liberal in its provisions with reference to amendments; and the *nisi prius* courts are given a wide discretion in this regard.

Before entering upon the trial of a cause the trial court may grant permission to the parties to amend their pleadings to almost any extent. After the trial is entered upon, and even after the cause has been finally submitted to the court or jury trying the cause, it is not error to allow amendments to conform the pleadings to the evidence, where there is no change made in the nature of the cause of action or defence. *Durham v. Fechheimer*, 67 Ind. 35; *Child v. Swain*, 69 Ind. 230; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Darrell v. Hilligoss, etc., G. R. Co.*, 90 Ind. 264; *Burns v. Fox*, 113 Ind. 205.

Unless it appears affirmatively that the opposite party is prejudiced by the amendment, the judgment will not be reversed because thereof, although the court may have erred in allowing the amendment to be made. *Hay v. State, ex rel.*, 58 Ind. 337; *Leib v. Butterick*, 68 Ind. 199; *Judd v. Small*, 107 Ind. 398; *Durham v. Fechheimer, supra*; *Child v. Swain, supra*; *Town of Martinsville v. Shirley, supra*.

But this court has always held that it is error to allow an amendment to the pleadings, which changes the nature of the

Levy et al. v. Chittenden et al.

cause of action or defence, after the trial has been concluded before the court or jury trying the same. *Miles v. Vanhorn*, 17 Ind. 245; *Proctor v. Owens*, 18 Ind. 21; *Hoot v. Spade*, 20 Ind. 326; *Shropshire v. Kennedy*, 84 Ind. 111; *Buskirk Practice*, 86.

It is not our opinion that the amendment which was made to the complaint changed the nature of the cause of action, or authorized any different evidence than might have been introduced under the original complaint.

The original complaint was in the nature of a creditors' bill, whereby the appellees sought to set aside certain mortgages and subject the mortgaged property to sale to pay certain judgments which they held against the mortgagor.

The amendment made only added to the complaint the averments that the mortgagor had been permitted to retain the possession of the property and allowed to dispose of a great part of it.

These were mere badges of fraud, and, as we think, were provable under the original complaint; but if we are wrong as to this last proposition, the amendment we think was one within the sound discretion of the court.

The court erred in the modification of its finding.

After the finding was announced and entered of record the power of the court over it is at an end, except that it may at any time before the close of the term at which judgment is rendered grant a new trial. See R. S. 1881, sections 550, 551 and 552; *Wray v. Hill*, 85 Ind. 546.

But the appellants were not injured, as will appear further on in this opinion, because of the error committed, and, therefore, the error will not work a reversal of the judgment. The appellees having been instrumental in bringing about the erroneous ruling of the court, they can in no way take advantage of it, nor can they ask the court to ignore the erroneous proceedings, but they are bound by the record as made.

The finding of the court is not within the cause of action

Levy et al. v. Chittenden et al.

stated in the complaint. The gravamen of the action is fraud, but this question is ignored by the court, and it is found that the indebtedness the mortgages were executed to secure has been paid. Where the facts found fail to show a cause of action such as is stated in the complaint, the plaintiff can not recover. *Brown v. Will*, 103 Ind. 71; *Thomas v. Dale*, 86 Ind. 435.

A finding which is not, in the technical sense of the code, a special finding, will not be disregarded because it specifically states the facts found, and is not in general terms a finding for the plaintiff or defendant. All findings which are not technically special findings are regarded and treated as general findings. *Conner v. Town of Marion*, 112 Ind. 517; *Lawson v. Hilgenberg*, 77 Ind. 221; *Powers v. Fletcher*, 84 Ind. 154; *Steel v. Grigsby*, 79 Ind. 184; *Bake v. Smiley*, 84 Ind. 212; *Downey v. State, ex rel.*, 77 Ind. 87; *Wallace v. Kirtley*, 98 Ind. 485.

To prevent injustice being done, it sometimes happens that the court is compelled to state the facts in its general finding. Suppose a meritorious cause of action fails for the reason that a tender or demand was not made before the bringing of the action, a finding generally for the defendant, as against the estoppel created by the record would at least give the defendant the advantage of the presumption, in a future action, that the questions involved had been once adjudicated. See *Evans v. Schafer*, 86 Ind. 135.

The court erred in rendering judgment upon the finding, as modified, for the appellees. The motion to modify the judgment should have been sustained.

Even if the appellees had been entitled to a judgment for the sale of the mortgaged chattels after the payment of the indebtedness secured by the mortgages, we can not imagine upon what principle a personal judgment could be rendered against the appellant Shackman, nor have we discovered any authority for the rendition of a judgment collectible without relief from valuation or appraisal laws.

Harrison v. Manship.

The statute (section 743, R. S. 1881) only provides for the sale of property fraudulently conveyed without relief from valuation or appraisement laws.

The judgment is reversed, with costs.

Filed Sept. 18, 1889.

No. 13,876.

HARRISON v. MANSHIP.

SLANDER.—Complaint.—Sufficiency of.—A complaint for slander alleged that the defendant spoke of and concerning the plaintiff that he “took and drove off his (meaning defendant’s) ducks and sold them, and that if he (meaning plaintiff) was so mean as to drive his (meaning defendant’s) ducks off and sell them, he could have them,” which charge it is alleged was false.

Held, that the words alleged to have been spoken are not actionable *per se*, and that in the absence of an averment of extrinsic facts giving them a criminal meaning, the complaint is bad, even after verdict.

From the Hamilton Circuit Court.

W. S. Christian and *I. W. Christian*, for appellant.

R. R. Stephenson and *W. R. Fertig*, for appellee.

COFFEY, J.—This was an action of slander brought by the appellant against the appellee in the Hamilton Circuit Court. The complaint in the cause, omitting the formal parts, is as follows :

“The plaintiff says that Thomas Manship, defendant, on the — day of December, 1886, at said county and State, in the presence and hearing of divers persons, falsely and maliciously spoke and uttered of and concerning the plaintiff the following false and malicious words : That he (meaning

Harrison v. Manship.

plaintiff) took and drove off his ducks and sold them; that he (meaning plaintiff) drove his (meaning defendant's) ducks off and sold them; that he (meaning plaintiff) drove his (meaning defendant's) ducks off and sold them, and if he (meaning plaintiff) was so mean as to drive his (meaning defendant's) ducks off and sell them that he (meaning plaintiff) could have them; that Allen C. Harrison drove his (meaning defendant's) ducks off and sold them; all of which charges were false and slanderous, whereby the plaintiff's character was brought into great and manifest and public scandal and disgrace, and he was damaged," etc.

The appellee answered by way of justification, to which a reply was filed, and the cause, being at issue, was submitted to a jury for trial.

During the progress of the trial the court came to the conclusion that the above complaint did not state facts sufficient to constitute a cause of action, and instructed the jury to return a verdict for the defendant, which was accordingly done.

The appellant filed a motion for a new trial, which was overruled, and the appellee had judgment for costs.

The appellant assigns as error the overruling of his motion for a new trial, while the appellee assigns as cross-error that the complaint does not state facts sufficient to constitute a cause of action.

The only question involved in the cause is the sufficiency of the above complaint, for if it states facts sufficient to constitute a cause of action it is plain that the court erred in its instruction to the jury to return a verdict for the appellee.

Where words are used, not actionable within themselves, there should be some prefatory allegation of some extrinsic matter, or an explanation of the particular and criminal meaning of the words. This introductory matter having been stated, the *colloquium* should connect with it the speaking of the words complained of, leaving to the *innuendo* its proper office of giving those words that construction which they bore in reference to the extrinsic fact, or explanation of

Harrison v. Manship.

their particular meaning. If a crime has been committed, and the words sued for were spoken in reference to it, that matter should be averred. If the defendant has been in the practice of using the words to express the commission of a crime, that fact should be alleged. If a word or phrase has a particular and criminal meaning, different from its ordinary import, and was used in its opprobrious sense by the defendant, those facts should appear. *Hays v. Mitchell*, 7 Blackf. 117.

There is no *colloquium* or *innuendo* laid in this complaint. We have simply the words "he drove off my ducks and sold them," without any averment as to the circumstances under which the words were spoken, or as to the sense in which they were used, or as to how they were understood.

The simple question, therefore, for our determination, is, do the words charged to have been spoken import the commission of a crime? We do not think they do. The verbs used are "take," "drive" and "sell," all of which in their usual sense denote innocent actions.

Had the appellant averred any extrinsic facts tending to show the commission of a crime, and had in any manner, by averment, connected the speaking of the words charged in the complaint with the commission of such crime, no matter how defective such averments, the complaint would have been good after verdict; but here, as we have seen, there is a total absence of any averment that a crime had been committed.

Where language is susceptible of an innocent and a criminal meaning, the court, after verdict for the plaintiff, upon a motion for a new trial, in arrest of judgment, or upon an assignment of error, will adopt the latter meaning, and where the language is rendered actionable by extrinsic circumstances defectively averred, the verdict will aid them; but language not actionable *per se*, in the absence of extrinsic circumstances, will not be so regarded, even after verdict. *McFadin v. David*, 78 Ind. 445.

In our opinion the complaint before us does not state a

Holland v. Barch.

cause of action ~~against~~ the appellee, and the court did not err in ~~directing~~ a verdict in his favor.

Judgment affirmed.

Filed Sept. 18, 1889.

No. 13,844.

HOLLAND v. BARTCH.

NEGLIGENCE.—Bicycle.—Rights of Road.—A bicycle is a vehicle, and is entitled to the rights of the road equally with a carriage or other vehicle.
SAME.—Frightened Horses.—Liability of Bicycle Rider.—The riding of a bicycle in the center of a highway, at a speed of fifteen miles an hour, to within twenty-five feet of horses attached to a carriage going in the opposite direction, is not negligence, rendering the rider of the bicycle liable for injuries caused to the occupant of the carriage by the horses taking fright.

SAME.—What Necessary to Liability.—To make the rider of a bicycle, who is proceeding along a public highway, liable for injuries caused by horses taking fright at his machine, which he propels at a speed of fifteen miles an hour until near the horses, it must be shown that the acts done by him were done at a time, or in a manner, or under circumstances, which showed a disregard for the rights of others.

SAME.—Complaint.—Motion to Make Specific.—Where a complaint charges the defendant, in general terms, with negligence in riding a bicycle upon a public highway, whereby the plaintiff's horse was frightened and ran away, thereby injuring him, a motion to have it made more specific by stating the particular acts constituting the negligence of the defendant should be sustained.

From the Wayne Circuit Court.

C. C. Binkley, for appellant.

T. J. Study, for appellee.

OLDS, J.—This is an action for damages. The first para-

Holland v. Barch.

graph of the complaint alleges that "the plaintiff, on the 16th day of August, 1885, was seated in a two-seated carriage, to which two gentle and well broken horses, both properly harnessed with good and sufficient harness, were properly and securely attached and hitched in the usual way, which said horses were then and there carefully and properly driven by a careful and competent driver seated in said carriage, and was then and there driving said team and carriage in which plaintiff was seated as aforesaid, on the public road and highway leading from Cambridge City, Indiana, to Jacksonburg; and when about two miles east of said Cambridge City, and in said county of Wayne, and driving carefully along and upon said highway, and in the part thereof usually driven upon by such teams and carriages, they were met at the place in said highway last above named by said defendant, seated upon and riding a large bicycle, the wheel of which bicycle was sixty inches in diameter, who then and there negligently and carelessly rode said bicycle at a rapid rate of speed, to wit, fifteen miles per hour, and negligently and carelessly ran the same along and in the center of said highway, at said rapid rate of speed, towards and into the faces of said horses, and in this way approached to within twenty-five feet of the faces of said horses, when and whereby said horses became and were greatly frightened, and became and were wholly unmanageable, and ran away, and in their fright ran along said road at a great speed, and upset said carriage, whereby the plaintiff was thrown violently to the ground," and sustained severe injuries, etc.

The averments of the defendant's acts of negligence are the same in the second and third paragraphs of the complaint as in the first paragraph. There is a variance as to some other averments, it being averred in the second that the strap by which one of the horses was fastened to the end of the pole of the carriage broke, and after the horses became frightened, the defendant dismounted and took hold of the

Holland v. Bartch.

bridle of one of the horses and endeavored to hold them, but let go of the horse before the driver dismounted.

The infancy of the defendant was suggested, and Reuben Bartch was appointed as his guardian *ad litem*. The defendant moved the court to require the plaintiff to make her complaint more specific as to how and in what manner the defendant rode and used said bicycle negligently and carelessly, and in what the alleged carelessness and negligence of the defendant consisted in the use of the said bicycle, and what acts and conduct of the defendant in riding and using said bicycle were negligently and carelessly done and performed by him, by reason of which said horses were frightened and caused to run away, causing said injuries to the plaintiff alleged in the complaint. Which motion to make each paragraph of said complaint more specific was sustained by the court, and exceptions reserved. The plaintiff refused to amend said paragraphs and make them more specific, and assigns the ruling of the court on the motion as error.

The allegations of the defendant's negligence in these paragraphs of complaint, in brief, charge that the plaintiff and defendant were travelling towards each other upon the highway, the plaintiff in her carriage and the defendant upon his bicycle, and that the defendant then and there negligently and carelessly rode his bicycle, at the rate of speed of fifteen miles per hour, up to and within twenty-five feet of the faces of the horses drawing the carriage in which the plaintiff was seated, whereby the horses became and were greatly frightened and became and were wholly unmanageable.

The allegations of negligence are general, and the theory we take of these paragraphs of complaint is that the negligence sought to be charged consists in the manner in which the defendant rode the bicycle, and not in the fact that he rode it at the rate of fifteen miles per hour, or along the center of the road to and within twenty-five feet of the faces of the plaintiff's horses.

Taking the theory we do of these paragraphs of the com-

Holland v. Bartch.

plaint, the defendant had the right to have the court require the plaintiff to make her complaint more specific by stating the particular acts constituting the negligence in the riding of the bicycle, that he might know with what particular acts of negligence he was charged. *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Hawley v. Williams*, 90 Ind. 160; *Cleveland, etc., R. W. Co. v. Wymant*, 100 Ind. 160.

The third paragraph differs somewhat from the first and second in the language used, but the acts charged are the same as in the other paragraphs, and we think the ruling of the court in sustaining the motion to make each paragraph of the complaint more specific was correct.

The next errors assigned are the sustaining the demurrers to the fourth and fifth paragraphs of the complaint.

The fourth paragraph is substantially the same as the first, except in the allegations of the negligence of the defendant, which are as follows: "Plaintiff was met at said place in said highway and public road by said defendant, who was then and there seated upon and riding a large bicycle, whose wheel was sixty inches in diameter, which said bicycle, with a rider seated upon it, as was well known to said defendant, was an unusual vehicle with which to travel upon such highway, and as he well knew was a frightful object for ordinary horses to meet, and was well calculated to and did frighten horses unaccustomed to meeting such vehicles with a rider mounted thereon; and well knowing these things, said defendant rode such bicycle at a very rapid rate of speed, to wit, at the rate of fifteen miles per hour, towards and into the faces of said horses, along and upon the middle of said highway, coming towards said horses until he approached to within twenty-five feet of the faces of said horses, which said act of riding said bicycle at such rapid rate of speed, and on and upon the center of said highway, until he approached within said twenty-five feet of the faces of said horses, knowing, as he well did, the effect of the same upon horses being driven

Holland v. Barch.

on such highway, was negligent and careless; and by such act of so negligently and carelessly riding said bicycle so up in front of and in the faces of said horses, said horses then and there and thereby became and were greatly frightened, and became and were wholly unmanageable," and in their fright ran away, etc.

The fifth paragraph only differs from the fourth in that it alleges that when the horses became frightened they jumped back, and one of the straps fastened to the end of the buggy pole broke, and defendant dismounted and seized the bridle-rein of one of the horses, and undertook to hold said horse until the driver could alight and hold the other horse, and the driver jumped from the carriage, and before he could get to and seize and hold the other horse, the defendant carelessly and negligently released his hold upon the horse so held by him, and the horses ran away and injured the plaintiff.

It is manifest that the defendant is not liable under this paragraph of the complaint, unless he is liable for causing the original fright of the horses.

The liability of the defendant sought to be charged in this paragraph, as in the other, is in causing the horses to become frightened. The injury is the primary result of the fright to the horses.

In determining the sufficiency of these paragraphs of complaint, it is proper to consider the rights of the parties. The acts of negligence charged in each of these paragraphs of complaint is the riding of the bicycle upon and along the center of the highway, at the rate of fifteen miles per hour, up to and within twenty-five feet of the faces of the horses.

In the case of *Mercer v. Corbin*, 117 Ind. 450, it is held that a bicycle is a vehicle, and entitled to the rights of the road, and has no lawful right to the use of the sidewalk.

In the case of *State v. Collins*, 17 Atl. Rep. 131, decided by the Supreme Court of Rhode Island, the court says: "The question raised by the exceptions is whether a bicycle is a carriage or vehicle, within the meaning of Pub. St. R. I. c.

Holland v. Barch.

66, section 1, which enacts that 'every person travelling with any carriage or other vehicle, who shall meet any other person so travelling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the travelled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption.' We are of the opinion that it is a carriage or vehicle which carries a person mounted upon it, and which is propelled and driven by him. The word 'vehicle' is certainly broad enough to include any machine which is used and driven on the travelled part of the highway for the purpose of conveyance upon the highway. The purpose of the section is to prevent accident or collision, and such accident or collision may happen from a bicycle and other carriage meeting, unless the rule laid down in the section is observed."

In the case of *Taylor v. Goodwin*, L. R., 4 Q. B. Div. 228 (27 W. R. 489), a bicycle was held to be a carriage.

Although but few courts have passed upon and defined the rights of persons riding upon and propelling or driving bicycles, yet such as have, unanimously place them upon an equality and governed by the same rule as persons riding or driving any other vehicle or carriage, and we think this the proper rule to adopt. Although the use of the bicycle, for the purpose of locomotion and travel, is quite modern, yet it is a vehicle of great convenience, and its use is becoming quite common; while travelling upon the highways by means of horses has been in vogue much longer, and is more universal at present than by means of bicycles, yet persons travelling by means of horses have no superior rights to those travelling upon the highway by improved methods of travel which are adapted to and consistent with the proper use of the highway.

In the case of the *Wabash, etc., R. W. Co. v. Farver*, 111 Ind. 195, speaking of the use of a portable engine, the court says: "It would not do to say that the operation of a portable engine, near a public highway, necessarily resulted in

Holland v. Bartch.

creating a nuisance, when it is according to daily experience, during certain seasons of the year, to see steam threshing-machines in operation on every hand, and often necessarily close to public highways. Road engines propelled by steam, and portable engines operated by steam, have become familiar in every agricultural community. To declare that their use near, or their passage over, a public highway constituted a nuisance, would be practically to prohibit their use in the manner in which they are customarily employed and moved from place to place. It must be supposed that horses of ordinary gentleness have become so familiar with these objects as to be safe, when under careful guidance." The same may be said of bicycles; to declare their use upon the public highways a nuisance would prohibit their use in the manner in which they are intended, and it must be supposed that horses of ordinary gentleness have become so familiar with them as not to scare at them, and as to be safe when under careful guidance.

In the case of *Macomber v. Nichols*, 34 Mich. 212, the court says: "Injury alone will never support an action on the case; there must be a concurrence of injury and wrong. If a man does an act that is not unlawful in itself he can not be held responsible for any resulting injury unless he does it at a time or in a manner or under circumstances which render him chargeable with a want of proper regard for the rights of others. In such a case the negligence imputable to him constitutes the wrong, and he is accountable to persons injured, not because damage has resulted from his doing the act, but because its being done negligently or without due care has resulted in injury. If the act was not wrongful in itself, the wrong must necessarily be sought for in the time or manner or circumstances under which it was performed, and injury does not prove the wrong, but only makes out the case for redress after the wrong is established."

In this case the acts complained of in each paragraph of the complaint are the riding of the bicycle in the center of the

Holland v. Bartch.

highway, at the rate of fifteen miles per hour, to and within twenty-five feet of the faces of the plaintiff's horses. It is these acts which are charged as negligence and as a wrong, but, as we have held, they are not unlawful acts and are not a wrong, hence they constitute no cause of action. To make a person liable for the doing of such acts they must be charged to have been done at a time, or in a manner, or under circumstances which render him chargeable with a want of proper regard for the rights of others, which is not done in either paragraph of the complaint. While the use of the locomotive is of infinitely more benefit than the bicycle in affording means of travel, so the danger arising from its use is also infinitely greater, yet the horse, the locomotive and the bicycle are all used as affording a means of travel, and more or less danger attaches to each. In discussing the liability of horses to become frightened at the locomotive, the learned Judge COOLEY, in delivering the opinion in *Macomber v. Nichols*, *supra*, says:

"Horses may be, and often are, frightened by locomotives in both town and country, but it would be as reasonable to treat the horse as a public nuisance from his tendency to shy and be frightened by unaccustomed objects, as to regard the locomotive as a public nuisance from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential." Further on in the opinion he says: "If one in making use of his own means of locomotion is injured by the act or omission of the other, the question is not one of superior privilege, but it is a question whether, under all the circumstances, there is negligence imputable to some one, and if so, who should be accountable for it."

The complaint in this case proceeds, and it can only be held good, on the theory that the plaintiff, riding in her carriage, had rights superior to the defendant, who was riding upon his bicycle, and such is not the law. They met upon

The State v. Dittmar.

the highway, each possessing equal rights to the use of it, for riding and driving their respective vehicles.

The fourth and fifth paragraphs of the complaint were each insufficient, and the court properly sustained the demurrers thereto.

There is no error in the ruling of the court.

Judgment affirmed, with costs.

Filed Sept. 18, 1889.

120 54
120 386

No. 15,096.

THE STATE v. DITTMAR.

CRIMINAL LAW.—*Oppressive Garnishment.—Exemption Laws.—Sending Claim Out of State to Evade.*—One who himself takes a claim out of this State with intent to deprive a debtor of the benefit of the exemption laws, "sends" the claim out of the State within the meaning of section 2162, R. S. 1881, making such act an offence.

From the Dubois Circuit Court.

L. T. Michener, Attorney General, *J. L. Bretz*, Prosecuting Attorney, *J. H. Gillett* and *J. F. Tieman*, for the State.
C. L. Jewett, for appellee.

ELLIOTT, C. J.—The affidavit upon which this prosecution is founded charges that the appellee, "being the owner of a demand on a contract against George F. Atkins amounting to the sum of nine dollars, with intent thereby to deprive the said George F. Atkins of his rights under the statutes of Indiana on the subject of exemption of property in proceedings for garnishment, did then and there unlawfully send said

The State v. Dittmar.

claim into the State of Kentucky for the purpose of collecting the same by proceedings in garnishment against the said George F. Atkins and against the Louisville, Evansville and St. Louis Railroad Company, as garnishee, defendants, the said railroad company being then and there indebted to the said George F. Atkins in the sum of thirty-three dollars; the said George F. Atkins being then and there a *bona fide* resident of the State of Indiana, and a householder, and each and all of the said parties, including said railroad company, being then and there within the jurisdiction of the courts of Indiana."

The record recites that every material allegation of the affidavit was proved beyond a reasonable doubt, except the allegation that the defendant did send the claim out of the State; on that point the evidence was that the defendant did not send the claim out of this State by any agency, but carried it out "upon his own person for the purpose and with the intent charged in the affidavit."

The trial court decided, as matter of law, that the appellee did not violate section 2162, R. S. 1881, and the question was properly reserved by the State.

The only question presented to us is this: Does a defendant who himself takes a claim out of the State, where the parties are all within its jurisdiction, with intent to deprive the debtor of the benefit of our exemption laws, send the claim outside of the State within the meaning of the statute? The controversy turns upon the question whether the defendant did send his claim into a foreign jurisdiction, the contention of the one side being that as the defendant himself carried it out he did not send it, while that of the other is that he did send it by himself.

It is quite clear that the mode of getting a claim into a foreign jurisdiction is utterly immaterial, for the plain purpose of the statute is to prevent creditors from depriving debtors of the benefit of our exemption laws. The material act is getting the claim out of the State to defeat the debtor's

Barlow v. The State.

exemption, and the mode of doing so does not affect the character of the act, so that the case before us is utterly unlike one in which the mode of transporting a thing is the act prohibited.

Our conclusion is that the appellee violated the law by taking the claim out of the State for the unlawful purpose which he did. To hold otherwise would defeat the manifest intent and purpose of the statute, and to hold as we do does no violence to the language employed by its authors. The appellee did send the claim into Kentucky within the meaning of the law, for among other meanings assigned to the word "send" are these: "To cause to be conveyed or transmitted;" "to cause to be;" "to cause to do the act." *Encyclopædic Dictionary*.

The appellee unquestionably caused the claim to be conveyed to Kentucky, and caused the act to be done, although he caused himself to do it.

Appeal sustained, at the costs of the appellee.

Filed Sept. 19, 1889.

No. 14,972.

BARLOW v. THE STATE.

CRIMINAL LAW.—*Malicious Trespass.*—*Claim of Right.*—A prosecution for malicious trespass will not lie where the act charged was done under an honest claim of right, without a mischievous or malicious intent.

From the Johnson Circuit Court.

R. M. Miller and *H. C. Barnett*, for appellant.

J. C. McNutt, Prosecuting Attorney, for the State.

Barlow v. The State.

MITCHELL, J.—The appellant was found guilty of the charge of maliciously and mischievously injuring the property of John Hemphill, by plowing up and destroying the garden of the latter, in which were sown and planted lettuce, onions, and other vegetables.

The uncontradicted testimony shows that the appellant is eighteen years old, and that he lives with, and works for, his father, John Barlow, who owns the lot on which the vegetables alleged to have been destroyed were growing. The lot had been rented to Hemphill some three years before, and had been used by him from year to year, in part as a vegetable garden. It appeared, however, that no garden had been made, or seed sown or planted the present year, but that some onions and lettuce had started to grow from seed which had fallen upon and remained in the ground over winter. In the latter part of March of the present year, the appellant, by the direction of his father, entered upon the lot, and, with the aid of other employees, plowed the ground and sowed it in oats.

There appears to have been some question between the father and Hemphill about the right to the possession of the lot, but the testimony is uncontradicted that the appellant did not know of the dispute, or that Hemphill claimed the lot. There is not a syllable of evidence tending to show a malicious or mischievous purpose on the part of the appellant; on the contrary, the entire evidence shows that he was simply obeying what he believed to be the rightful command of his father. Where a defendant is acting in good faith, doing what he honestly supposes he has a right to do, or what he believes it is his duty to do, he can not rightfully be made amenable to the criminal law in order to settle questions of disputed right. This mode of settling disputes, in which only matters of purely private concern are involved, and in which the State has no possible interest, is to be discouraged.

The machinery of the criminal law is not to be set in motion to redress merely private grievances, or to settle ques-

Caspar v. Jamison *et al.*

tions of property, where honest differences of opinion are involved. In a case like this, the absence of a malicious or mischievous purpose is a complete protection against criminal liability, and when it appears that a defendant acted in good faith, under an honest claim of right, the malicious or mischievous intent necessary to sustain a conviction is rebutted. *Hughes v. State*, 103 Ind. 344, and cases cited.

The judgment is reversed.

Filed Sept. 18, 1889.



190	58
196	520
196	556
196	587
120	58
138	402

No. 13,277.

CASPAR v. JAMISON ET AL.

REAL ESTATE.—*Action to Recover.*—*Defendant Admits Possession by Pleading.*—Where, in an action to recover possession of real estate, the defendant appears and files a general denial, he thereby admits that he has possession of the entire tract in controversy.

SAME.—*Conflicting Descriptions.*—*Which is Controlling.*—*Quieting Title.*—*Survey.*—*Monuments.*—*Showing Location by Parol.*—In an action to quiet title, the court, in pursuance of a survey made by its order, found that the plaintiff was the owner of, and gave judgment quieting title to, one hundred and fifty acres of land, to be taken off the south side of a certain fractional section in a given township and range, its full length from east to west, and wide enough north and south to include one hundred and fifty acres; this description was followed by courses and distances purporting to describe said one hundred and fifty acres, but in fact describing less than half that quantity of land. In an action by the same plaintiff against the same defendants to recover possession of the land,

Held, that as the description first given is complete and reliable, and describes the quantity of land which the plaintiff was adjudged to own, it controls the subsequent description by courses and distances.

Held, also, that for the purpose of showing a mistake in the latter descrip-

Caspar v. Jamison et al.

tion, parol evidence was admissible to show the location of the stakes planted by the surveyor, where they can not be found.

From the Washington Circuit Court.

S. B. Voyles, H. Morris and W. K. Marshall, for appellant.

J. A. Zaring, M. B. Hottel, D. M. Alsbaugh and J. C. Lawler, for appellees.

BERKSHIRE, J.—This is an action brought by the appellant against the appellees to recover the possession of real property.

The answer was but a general denial. The case was tried by a jury and the following verdict returned in favor of the appellees:

"We, the jury, find for the defendants," and, over a motion for a new trial, the court rendered the following judgment: "It is, therefore, considered by the court that the defendants go hence without day, and recover of the plaintiff their costs by them about their defence in this suit expended."

The following description of the real estate is given in the complaint: "One hundred and fifty acres of land to be taken off of the south side of fractional section fourteen (14), township four (4) north, of range three (3) east, to be taken the full length of said fractional section from the east side thereof to the Driftwood fork of White river, and wide enough north and south to include one hundred and fifty acres, the northwest corner of said tract being indicated by a stake as a monument in a survey made by R. M. J. Cox in the year 1882, which monument was placed on the east bank of said river; the northeast corner of said tract being designated by a stake placed on the east line of said fractional section by said Cox in making said survey; the south boundary of said land being the south line of said fractional section," in Jackson county, State of Indiana.

There are three reasons assigned in the motion for a new

Caspar v. Jamison et al.

trial, the first two of which are all that we care to consider. These are: 1. The verdict of the jury is not sustained by sufficient evidence. 2. The verdict of the jury is contrary to law.

That the appellant was the owner and entitled to the possession of a part of the real estate described in her complaint was not controverted on the trial. The general denial which the appellees filed admitted their possession of the entire real estate. R. S. 1881, section 1056; *Voltz v. Newbert*, 17 Ind. 187; *Rucker v. Steelman*, 73 Ind. 396; *Applegate v. Doe*, 2 Ind. 169; *Carver v. Carver*, 97 Ind. 497.

To the extent to which the appellant's title and right of possession were not controverted, there is no question as to her right of recovery; as the appellant was entitled to a recovery as to a part, if not as to the whole of said real estate, the verdict was not sustained by sufficient evidence, and was contrary to law, and a new trial should have been granted.

But does not the evidence show that the appellant was the owner and entitled to the possession of all of the real estate described in her complaint?

For the September term, 1882, of the Jackson Circuit Court the appellant commenced her action against the appellees to quiet her title to certain real estate therein described. Afterwards, and at the said term, by order of the court, and upon the application of the appellant, one R. M. J. Cox was ordered to make a survey of the following real estate, to wit: "One hundred and fifty acres off of the south side of fractional section. 14, township 4 north, of range 3 east, to be taken the full length of said fractional section from the east side of said fractional section to the Driftwood fork of White river, and wide enough north and south to make and include said 150 acres in said fractional section."

Afterwards the said Cox made a survey of the said real estate, and made his report to the court, which was accepted and acted upon by the court, and the following finding and judgment rendered:

Caspar v. Jamison *et al.*

"I find that the plaintiff, Sarah E. Caspar, is the owner in fee simple of one hundred and fifty acres of land, situated in Jackson county, Indiana, to be taken off of the south side of fractional section fourteen, township four north, of range three east, to be taken the full length of said fractional section fourteen, township four north, of range three east, to be taken the full length of said fractional section from the east side thereof to Driftwood fork of White river, wide enough north and south to include one hundred and fifty acres; and said one hundred and fifty acres is bounded by a line beginning at the southeast corner of said fractional section fourteen, and running thence south 88° west, along the south line of said fractional section to the confluence of the Muscatatuck river and the Driftwood fork of White river, thence up said Driftwood fork of White river, with the meanderings thereof, to a stake placed as a monument by R. M. J. Cox, surveyor, at a point nine and one-third chains north of the south line of said fractional section fourteen; thence north 88° east, parallel with the south line of said fractional section, fifty-three and $\frac{4}{10}$ chains to a stake in the east line of said fractional section; thence south $3\frac{1}{2}^{\circ}$ east, along the east line of said fractional section, nine and one-third chains to the place of beginning, at the southeast corner of said fractional section. I also find that the claim of the defendants, Charles Jamison and George Pugh, or either of them, to said one hundred and fifty acres of land above described, or any part thereof, is unfounded and without right, and is a cloud on plaintiff's title thereto, and that said cloud ought to be removed, and the plaintiff's title to said one hundred and fifty acres ought to be forever and perpetually quieted as against said defendants and each of them, and as against all other persons claiming title or right to said land or any part thereof, by, or through, or under said defendants, or either of them."

And upon its said finding the court rendered the following judgment:

Caspar v. Jamison et al.

"It is therefore ordered and decreed by the court that plaintiff's title in fee simple be and the same is hereby forever quieted and set at rest as against the defendants, and each of them, and against all persons claiming through or under them, as to the one hundred and fifty acres hereinbefore mentioned and referred to, which land is situated in Jackson county, Indiana. It is further considered by the court that the plaintiff do recover of defendants all her costs and charges herein laid out and expended."

It is evident that the courses and distances as given do not bound a tract of land containing one hundred and fifty acres, but a tract of land containing less than half that number of acres. There are really two descriptions contained in the finding and judgment of the court: 1. "One hundred and fifty acres of land situated in Jackson county, Indiana, to be taken off of the south side of fractional section fourteen, township four north, of range three east, to be taken the full length of said fractional section fourteen, township four north, of range three east, to be taken the full length of said fractional section from the east side thereof to Driftwood fork of White river, wide enough north and south to include one hundred and fifty acres." 2. "And said one hundred and fifty acres is bounded by a line beginning at the southeast corner of said fractional section fourteen, and running thence south 88° west, along the south line of said fractional section, to the confluence of the Muscatatuck river and the Driftwood fork of White river, thence up said Driftwood fork of White river, with the meanderings thereof, to a stake placed as a monument by R. M. J. Cox, surveyor, at a point nine and one-third chains north of the south line of said fractional section fourteen, thence north 88° east, parallel with the south line of said fractional section, fifty-three and $\frac{4}{10}$ chains to a stake in the east line of said fractional section, thence south 3½° east, along the east line of said fractional section, nine and one-third chains to the place of beginning, at the southeast corner of said fractional section."

Caspar v. Jamison *et al.*

The first description is a complete and perfect description, and it contains the number of acres named in the finding and judgment as belonging to the plaintiff; the second description is also a perfect description, but it does not contain half the number of acres which it purports to describe.

When we look through the record in this case and especially the order for the survey preceding the finding and judgment of the court, we find that the object and purpose of the survey was to ascertain and describe one hundred and fifty acres of land on the south side of the section, extending from the east line of the section west to the Driftwood fork of White river, and in looking through the record we are forced to the conclusion that the appellant was the owner of one hundred and fifty acres of land on the south side of said section as stated above, and that the court intended by its judgment to quiet her title thereto.

It is a well settled rule of construction applied to decrees or conveyances, where, either in whole or in part, the real estate is described by two different descriptions which can not be reconciled, to give preference to that description which is the most certain and reliable; for instance, monuments will control course and distance. The rule is thus declared in the elementary works on real property. *Ayers v. Watson*, 113 U. S. 594, 608; *Maguire v. Bissell*, 119 Ind. 345; *Simonton v. Thompson*, 55 Ind. 87; *City of Evansville v. Page*, 23 Ind. 525; *Hedge v. Sims*, 29 Ind. 574; *Wingler v. Simpson*, 93 Ind. 204.

The first description found in the finding and decree of the court is a description about which there can be no mistake. It would be difficult to give a more certain and reliable description of one hundred and fifty acres of land and its location, unless possibly a description controlled by well ascertained and permanent monuments, while there is always room for mistakes as to courses and distances. We are of the opinion that the first description given should control in this case (1) because of the fact that it was evidently the in-

Caspar v. Jamison et al.

tention of the court to find and adjudge that the plaintiff was the owner of one hundred and fifty acres of land and to quiet her title thereto ; (2) because the first description covers one hundred and fifty acres of land, and the second description not the one-half of that quantity ; and (3) because the first description is certain and reliable, while the second description is open to mistake. But the evidence shows that there was in fact a mistake in the second description : 1. It purports to contain one hundred and fifty acres of land, but contains in fact less than one-half of that number of acres. 2. The intention of the court was to quiet title to one hundred and fifty acres of land, but if the latter description prevails the appellant's title was quieted to less than one-half of that number of acres. 3. The surveyor and others testify that the stakes referred to were planted nineteen and one-third chains from the south line of the section, and not nine and one-third chains north of the south line of the section, as shown in his report and in the decree of the court ; and that nineteen and one-third chains north from the south line would include within the description one hundred and fifty acres.

The stakes, wherever they were, if standing, would control the distances, but they were not to be found. It is objected that parol evidence was not allowable to prove where the stakes were planted. Why not? If the stakes were present their identity could certainly be established by parol evidence, and for the same reasons the place of their location might be shown by the same character of evidence. The evidence was clearly competent, not only for the purpose of controlling the distances by the monuments, but for the purpose of strengthening the position that the first description should be regarded as the true description. There was no conflict, we think, in the evidence as to where Cox planted the stakes. Our construction of the judgment in the action to quiet title is, that the first description is the true description, and that the judgment quieted the title of the appellant

Kiley v. The State.

to one hundred and fifty acres of land as therein described.
Wingler v. Simpson, supra; Hedge v. Sims, supra.

The judgment is reversed, with costs, and the court is instructed to grant a new trial, and to proceed in accordance with this opinion.

Filed May 18, 1889; petition for a rehearing overruled Sept. 25, 1889.

No. 15,036.

KILEY v. THE STATE.

CRIMINAL LAW.—Minor.—Pool Table.—Permission to Play Upon.—Indictment.—Duplicity.—Statute Construed.—Under section 2087, R. S. 1881, which provides that any person owning or managing a pool table, etc., who allows or suffers a minor to play at or upon such table, shall, upon conviction thereof, for each game so allowed or suffered to be played, be fined in any sum not more than fifty dollars nor less than five dollars, the offence consists in allowing the minor to play, the number of games played under one permission relating merely to the question of punishment, and hence where an indictment charges the playing of four games of pool at one time and place, it is not bad for duplicity.

SAME.—Witness.—Immaterial Testimony.—In a prosecution for permitting a minor to play upon a pool table, a question propounded to a witness asking him whether or not "he is the same person who had been a witness in several liquor cases," is objectionable, as calling for immaterial testimony.

From the Grant Circuit Court.

A. Steele and *J. A. Kersey*, for appellant.

S. W. Cantwell, Prosecuting Attorney, and *H. J. Paulus*, for the State.

OLDS, J.—This is a prosecution for unlawfully permitting
 VOL. 120.—5

120	66
132	428

Kiley v. The State.

a minor to play pool. The indictment charges that the defendant, John Kiley, on the 4th day of September, A. D. 1888, at said county of Grant, and State of Indiana, did then and there own and have the care, management and control of a certain pool-table, then and there situate, and did then and there unlawfully allow, suffer and permit one John Winchell to play four games of pool, at and upon said table, with one Isaac Wagoner, he, the said John Winchell, being then and there a person under the age of twenty-one years. There was a trial and the defendant found guilty, and his punishment assessed at a fine of twenty dollars.

There was a motion for a new trial by the defendant, which was overruled, and exceptions taken, and the defendant then moved the court in arrest of judgment, for cause that the facts stated in the indictment do not constitute a public offence; which motion in arrest of judgment was overruled and exceptions taken, and the rulings of the court in overruling the motion for a new trial and in arrest of judgment are assigned as error.

The objection urged by counsel for appellant to the indictment is that it charges four separate and distinct offences; that the playing of one game of pool constituted an offence, and the indictment charges the playing of four games, and that the indictment is bad for duplicity. It is the well-settled doctrine that an indictment is bad which charges in one count two or more separate and distinct offences. *State v. Weil*, 89 Ind. 286; *Knopf v. State*, 84 Ind. 316. A motion to quash such an indictment made at the proper time would have to be sustained; but the question in this case is as to whether or not the indictment charges more than one offence. The statute upon which the prosecution is based reads as follows: Section 2087, R. S. 1881. "If any person owning or having the care, management, or control of any billiard table, pool table, or any kind of gaming table, bagatelle table, or pigeon-hole table, shall allow, suffer, or permit any minor to play billiards, bagatelle, pool, or any other game at or upon

Kiley v. The State.

such table or tables, he shall, upon conviction thereof, for each game so allowed, suffered, or permitted to be played, be fined in any sum not more than fifty dollars nor less than five dollars."

The offence, as we regard it, consists in allowing, suffering, or permitting a minor to play at or upon such table, and the punishment which shall be assessed depends upon the number of games; that is to say, the person owning, or having the care, management or control of a pool table is liable to a separate prosecution for each time he allows, suffers, or permits a minor to play at or upon such table; and when so allowed to play, if the minor plays one game, the person is liable to a fine of not more than fifty nor less than five dollars; if the minor plays two games, the person so permitting him is liable to a fine in double the amount, and so on in proportion to the number of games played under the one permission to play; each time permission is given, or the minor is suffered or allowed to play constitutes a separate and distinct offence, but when once permission is given, and the minor is allowed or suffered to play, the number of games played at one continuous sitting or playing constitutes but one offence, although several games may be played in succession; but if such minor ceases to play, and is again allowed, suffered or permitted to play, such subsequent playing constitutes a separate offence. This we think the fair and reasonable construction to be placed upon this section of the statute; to construe it otherwise we think would be placing an unnecessary burden upon the State, and inflicting a corresponding hardship upon the defendant by compelling the State to institute separate prosecutions for each game played, and subject the defendant to the payment of the costs of the several prosecutions for the doing of what is, in fact, but one unlawful act, and we think this construction fairly supported by the authorities. *Nace v. State*, 117 Ind. 114; *Freeman v. State*, 119 Ind. 501; *Moore v. State*, 65 Ind. 213.

The indictment charges the playing of four games of pool

Kiley v. The State.

at one time and place. The motion in arrest was properly overruled.

It is further urged, that the court erred in giving the ninth instruction to the jury, which is as follows: "If you find the defendant guilty, you will take into consideration the number of games played by the witness Winchell, if more than one, which the evidence shows to have been played." What we have said in regard to the indictment, disposes of the objection made to this instruction. The instruction was not subject to the objection urged.

Upon cross-examination of the witness Winchell in rebuttal, the appellant asked him the question as to whether "he was not the same Winchell who had been a witness in several liquor cases;" to which question the State objected, and the court sustained the objection, and this ruling is assigned as error. It does not appear that the testimony to be elicited by this question would have any materiality. From anything that appears in the case, it was immaterial whether the witness had been a witness in other cases or not, and the objection was properly sustained.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Sept. 19, 1889.

Ashton v. Shepherd.

No. 13,897.

ASHTON v. SHEPHERD.

SUPREME COURT.—Complaint.—Assignment of Error Upon.—It can not be assigned as error that a particular paragraph of a complaint does not state facts sufficient to constitute a cause of action; the complaint can only be questioned in such way as an entirety.

DEED.—To Indemnify Surety.—Mortgage.—A deed executed by a judgment debtor to indemnify against loss one who has become liable as replevin bail is, in legal effect, a mortgage.

MONEY HAD AND RECEIVED.—Right of Action for.—The right of action for money had and received is based upon the fact of the receipt of money, or its equivalent, by one from another, under such circumstances as that the law implies a promise to repay it.

SAME.—Action on Implied Promise.—Proof of Express Promise.—Variance.—Amendment of Complaint.—Where the complaint is based upon an implied promise to repay money paid out by the plaintiff for the defendant's benefit, proof showing an express promise to repay is an immaterial variance, and the plaintiff may amend his complaint after trial to make it conform to the evidence.

From the Fulton Circuit Court.

G. W. Holman and R. C. Stephenson, for appellant.

J. S. Slick and F. H. Terry, for appellee.

COFFEY, J.—The complaint in this cause consists of two paragraphs. The second is based upon a promissory note, and the first avers that the appellant is indebted to the appellee in the sum of \$5,153.05 for money had and received of the appellee for the use of the appellant, at his special instance and request, which is due and wholly unpaid. An itemized account is filed with the first paragraph of the complaint, showing various sums of money paid to Charles H. Nix, to the treasurer of Fulton county, and to the marshal of the town of Rochester, Indiana.

A trial of the cause by the court, without the intervention of a jury, resulted in a finding in favor of the appellee for the sum of \$165.82 on the second paragraph of the com-

120	69
129	133
120	69
144	116
144	162
146	88
120	69
155	182
120	69
163	581

Ashton v. Shepherd.

plaint, and for the further sum of \$2,567.44 on the first paragraph. The appellant filed a motion for a new trial, which was overruled, and he excepted. The court then rendered judgment on said finding.

The errors assigned are :

1st. That the first paragraph of the complaint does not state facts sufficient to constitute a cause of action.

2d. That the circuit court erred in overruling the appellant's motion for a new trial.

The first assignment of error presents no question for the consideration of this court. It can not be assigned as error that a particular paragraph in a complaint does not state facts sufficient to constitute a cause of action. Such assignment must be predicated upon the complaint as an entirety, and if there is a good paragraph in the complaint the assignment will be unavailing. *Higgins v. Kendall*, 73 Ind. 522; *Iles v. Watson*, 76 Ind. 359; *Trammel v. Chipman*, 74 Ind. 474; *Carr v. State, ex rel.*, 81 Ind. 342; *Schuff v. Ransom*, 79 Ind. 458; *Haymond v. Saucer*, 84 Ind. 3; *Louisville, etc., R. W. Co. v. Peck*, 99 Ind. 68; *Ludlow v. Ludlow*, 109 Ind. 199; *Louisville, etc., R. W. Co. v. Ader*, 110 Ind. 376.

If a defendant desires to test the sufficiency of a particular paragraph in a complaint, he must do so by demurrer.

The evidence in the cause tends to prove that prior to the 11th day of November, 1878, the appellant was the owner of what was known as the Ashton Machine and Foundry property in the city of Rochester, Indiana, and while so the owner of said property, judgments were rendered against him in the circuit court, upon which Augustine Meisch became replevin bail. For the purpose of indemnifying said Meisch, and to save him harmless on account of his liability as such replevin bail, the appellant, on the 11th day of November, 1879, conveyed said property to the said Meisch and his wife Catharine. Meisch being unable to pay the judgments, with the consent of the appellant, he and his wife conveyed the property to Charles H. Nix, who undertook to pay the judgments, and

Ashton v. Shepherd.

who, in consideration of such conveyance, agreed that appellant might sell the property within a given time, and after repaying to Nix the amount of money expended by him, with the interest thereon, should retain the remainder for his own use. The appellant subsequently procured the said Nix to convey said property to the appellee upon her making arrangements with him, to his satisfaction, for the amount he had advanced for the use of the appellant, the amount being \$5,000. It was agreed between the appellant and the appellee that the appellant should repay all sums of money paid out by her for his use, and that she should hold the title to said property as security for the performance of said agreement. At the time of the conveyance from Nix to the appellee she paid him, by the assignment of a note and mortgage, the sum of \$1,882.40, and executed to him her notes, payable in equal instalments, in one, two, three, four and five years, for the balance of the \$5,000, and secured the payment of the same by a mortgage back upon the property. She paid the taxes on said property, and subsequently paid two of said notes, together with a large amount of interest, and being unable to pay the remainder of the \$5,000, the mortgage given to secure the same was foreclosed and the property sold. During all this time the appellant remained in the possession of the property, paying no rent therefor.

It was objected to the introduction of the evidence tending to prove these facts, that this was an action for money had and received, and that they did not tend to sustain such an action, and it is now contended in argument that these facts do not sustain an action of that kind.

The general principle governing actions for money had and received is, that the defendant must have come into the possession of money which he can not conscientiously withhold from the plaintiff.

To maintain an action for money had and received, it must be shown that before the action is brought, the defendant actually received the money, or something which in re-

Ashton v. Shepherd.

ality or presumptively was converted into money, or that something was received as money or instead of it. For money had and received the action is equitable, and is based, not upon a promise, but upon the fact of the receipt of money by one from another through the medium of oppression, imposition, extortion or deceit, or by mistake of fact, or without consideration, or upon a consideration that has failed, from which the law implies a promise to repay. *Hatten v. Robinson*, 4 Blackf. 479; *Lemans v. Wiley*, 92 Ind. 436.

But we do not understand this to be an ordinary action for money had and received. It is clear from the complaint and the bill of particulars filed therewith, that the appellee was seeking to recover from the appellant the amount of money she paid to Nix and had paid for taxes at the request of the appellant.

If the theory of the appellee be correct, the appellant never at any time parted with the equitable title to his property. The deed to Augustine Meisch and Catharine Meisch amounted to a mortgage, and nothing more. *Butcher v. Stultz*, 60 Ind. 170; *Crane v. Buchanan*, 29 Ind. 570; *Wheeler v. Ruston*, 19 Ind. 334.

As to the effect of the other conveyances, it is unnecessary to inquire, as they have but little, if any, bearing upon the questions involved in the case. It is true that there is no express promise averred in the complaint to repay the money advanced by the appellee at the request of the appellant, but the law would imply a promise to repay it. If the appellee advanced the money named in her complaint to Nix and others, upon the express promise of the appellant to repay it, we know of no reason, either legal or equitable, why he should not do so. While it may be true that the complaint is based upon an implied promise to repay the money paid out by the appellee, we think that the proof, showing an express promise, is an immaterial variance, and that the appellee might have amended her complaint after trial so as to

The Adams Express Company v. Harris et al.

make it conform to the evidence. Section 391, R. S. 1881; *Farley v. Eller*, 29 Ind. 322.

We do not think the court erred in admitting the evidence to prove the facts above set out, and we are, also, of the opinion that the evidence tends to support the finding of the circuit court.

It is also claimed by the appellant that the amount assessed by the circuit court is excessive. In this, however, we think he is mistaken. The amount paid out by the appellee, with the interest thereon, largely exceeds the amount assessed by the court.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed Sept. 19, 1889.

180	73
194	184
120	73
165	247
120	73
1166	349

No. 13,706.

THE ADAMS EXPRESS COMPANY v. HARRIS ET AL.

COMMON CARRIER.—Connecting Lines.—Relation to Original Contract.—Where a contract is made with a common carrier for the transportation of goods, no intermediate carriers being designated, and containing no provisions that its stipulations shall enure to the benefit of all the carriers, an intermediate carrier, by accepting the goods for transportation, is bound by the ordinary rules in the absence of a special contract, and can claim the benefit of none of the provisions of the original contract.

SAME.—Detention for Freight.—Waiver.—A common carrier waives his right to detain goods for the freight if his refusal to deliver is on the ground that they are not in his possession at the place where a demand is duly made.

SAME.—Declarations of Agent.—When Principal Bound.—A corporation

The Adams Express Company v. Harris *et al.*

having invested an agent with general authority to adjust claims against it, the declarations of such agent in the adjustment of a claim are competent evidence against it.

SAME.—*Limitation of Damages.*—*Not Available when Negligence is Shown.*—A limitation of damages, without reduction in rate of freight, will not avail when negligence is shown.

PLEADING.—*Allegation of Partner's Names.*—*Unnecessary when.*—*Allegation of Incorporation.*—Where the names of the plaintiffs are given in full in the title of a cause, in alleging that the plaintiffs are partners, it is sufficient to allege that fact without again giving their names; and, also, where the name of a defendant imports that it is a corporation, a specific allegation is unnecessary.

From the Morgan Circuit Court.

J. H. Jordan and *O. Matthews*, for appellant.

G. A. Adams and *J. S. Newby*, for appellees.

ELLIOTT, C. J.—The material facts pleaded by the appellees as their cause of action are these: On and prior to the 17th day of January, 1885, they were partners, engaged in business as nurserymen; on that day a lot of fruit trees was delivered to the United States Express Company at Champaign, Illinois; the trees were owned by the plaintiffs, and were directed to them at Mooresville, Indiana; the United States Express Company undertook to carry the trees to Indianapolis, and there deliver them to some other carrier to be transported to their destination; a written contract was made between the United States Express Company and the plaintiffs, which contained, among others, these provisions: That the person or corporation to whom the trees shall be delivered for transportation from the end of that company's line to their destination, shall not be deemed the agent of the company, but shall be deemed the agent of the plaintiff; that the company shall not be liable for injury to the goods, unless it "be proved to have occurred from the fraud or gross negligence of the company or its servants, nor shall any demand be made upon the company for more than fifty dollars, at which sum said property is hereby valued." There is no provision in the contract for the benefit of any carrier ex-

The Adams Express Company v. Harris *et al.*

cept the United States Express Company, nor is any other carrier named. The trees were delivered to the defendant in good condition, at Indianapolis, and it carried them to Mooresville; after they had reached there, the plaintiffs went to the office of the defendant prepared to pay the charges and receive the trees, and, although they were then in the possession of the defendant's agent, he denied that they had been received; on a subsequent day the plaintiffs went again to the defendant's office, received the trees and paid the freight on them. The trees were so injured, through the negligence of the defendant, as to be utterly valueless. The plaintiffs had sold the trees to divers persons, and had agreed to deliver them on the 19th day of October, 1885, and the refusal of the defendant to deliver the trees when first demanded caused the plaintiffs to lose the profits of the sales made by them, for the reason that the delay prevented them from delivering the trees to the purchasers in accordance with their contract.

The contention of the appellant is, that the contract between the United States Express Company and the plaintiffs bound both them and the appellant, that the latter, when it accepted the goods for transportation, became bound to comply with the provisions of the contract, and secured a right to all its stipulations in favor of the first carrier, and that the contract continued in force for the benefit of all the parties until the goods were delivered at their destination. The opposing contention is, that the contract between the United States Express Company and the plaintiffs did not enure to the benefit of the appellant, and that when it accepted the goods for transportation it received them under the law, and became bound by the ordinary rules which prevail in cases where there is no special contract.

If the appellant had been designated in the contract with the first carrier as one of the intermediate carriers, or if the contract had provided that its stipulations should enure to the benefit of all the carriers, then the contention of the ap-

The Adams Express Company v. Harris et al.

pellant would find strong support from the authorities. *U. S. Express Co. v. Harris*, 51 Ind. 127; *St. Louis, etc., R. W. Co. v. Weakly*, 50 Ark. 397; *Halliday v. St. Louis, etc., R. W. Co.*, 74 Mo. 159 (41 Am. Rep. 309); *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594; *Maghee v. Camden, etc., R. R. Co.*, 45 N. Y. 514; *Lamb v. Camden, etc., R. R. Co.*, 46 N. Y. 271.

But the contract does not provide that its stipulations shall enure to the benefit of any other carrier than the one with whom it was made, nor does it designate any other carrier along the line. Its provisions apply only to the carrier with whom the contract was directly made, and they leave it to that carrier to select the carrier from the termination of its line to the end of the route. The authorities are substantially agreed that in such a case the intermediate carrier can not successfully claim the benefit of the provisions of the original contract. *Martin v. American Ex. Co.*, 19 Wis. 356; *Bancroft v. Merchants, etc., Co.*, 47 Iowa, 262 (29 Am. Rep. 482); *Merchants, etc., Co. v. Bolles*, 80 Ill. 473; *Camden, etc., R. R. Co. v. Forsyth*, 61 Pa. St. 81; *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616.

The rule declared by the decisions we have referred to is the only one that can be defended on principle, for where the contract designates only one carrier, there is no privity between the owners and the undesignated carriers; but where the contract is a through one, by designated carriers, there is a privity of contract, for it is justly inferable that the contract was intended for the benefit of all who perform services under it. So, too, where the contract declares that it is for the benefit of intermediate carriers, it may be enforced, since it is a contract for the benefit of a third person; and as it is beneficial to him it is natural to presume that its terms were assented to, and formed the contract under which the goods were transported. Where, however, the contract is solely for the benefit of the original parties it is not possible to apply this rule to it.

The Adams Express Company v. Harris et al.

Where, as here, the names of the plaintiffs are given in full in the title of the cause, it is unnecessary to repeat them in alleging that the plaintiffs were partners. It is sufficient to allege that the plaintiffs were partners without again giving their names. The name of the defendant imports that it is a corporation, and it was, therefore, not necessary to specifically aver that it was a corporation. *Adams Express Co. v. Hill*, 43 Ind. 157; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Sayers v. First Nat'l Bank*, 89 Ind. 230.

The defendant's denial of the possession of the goods at Mooresville excused the plaintiffs from making a tender of the carrier's charges. A common carrier waives his right to detain goods for the freight if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made. *Vinton v. Baldwin*, 95 Ind. 433, and cases cited; *Mathis v. Thomas*, 101 Ind. 119; *Platter v. Board, etc.*, 103 Ind. 360; *House v. Alexander*, 105 Ind. 109.

Where a corporation invests an agent with general authority to adjust claims against it, the declarations of that agent made while endeavoring to secure an adjustment of the claim are competent evidence against his principal. This general rule has often been applied in insurance cases, and must necessarily apply in such cases as this; for otherwise the corporation would be entirely without a representative.

In deciding, as we have, that the provisions of the contract with the United States Express Company can not be taken advantage of by the appellant we have disposed of the point that the damages are limited to fifty dollars; but if we were wrong in this, still the limitation will not control since there is evidence of negligence, and no evidence that a lower rate of freight was given on account of the limitation placed upon the value of the property. *Rosenfeld v. Peoria, etc., R. W. Co.*, 103 Ind. 121; *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281; *United States Ex. Co. v. Backman*, 28 Ohio St. 144.

Langsdale v. Woollen, Administrator.

As there was evidence of negligence, and no evidence that there was any special consideration inducing the owners to place a less value on their property than its actual worth, the limitation, even conceding it to be available to the appellant as a part of the contract, is nullified.

The instructions of the court are quite as favorable to the appellant as the law warrants, and the evidence fully supports the verdict.

Judgment affirmed.

Filed May 9, 1889; petition for a rehearing overruled Sept. 25, 1889.

No. 9473.

LANGSDALE v. WOOLLEN, ADMINISTRATOR.

PLEADING.—*Complaint to Annul Letters of Administration.*—*Paragraph Bad for Uncertainty.*—*Paragraph Showing Assets.*—A paragraph of complaint in an action to annul letters of administration on the ground of there being no assets of the estate within the jurisdiction of the court when the administrator was appointed, alleging that no assets or property of the decedent had come into the county, and if so the same had been administered before the appointment of the administrator, is bad for uncertainty; also, a paragraph is bad showing indebtedness under judgment upon suit brought by the administrator, whose letters of administration it is sought to annul for the reason that there are no assets.

DECEDENTS' ESTATES.—*Preceding Administrator.*—*Inability to Discover Assets.*—*Administrator, Appointment of, de bonis non.*—That a preceding administrator is unable to discover assets belonging to the estate, will not prevent the appointment of an administrator *de bonis non*.

SAME.—*Common Pleas Court.*—*Presumption of Jurisdiction.*—Jurisdiction of the common pleas court, a court of general jurisdiction of matters probate at the time of the appointment of the administrator herein, in the absence of a showing to the contrary, will be presumed.

From the Marion Circuit Court.

Langsdale v. Woollen, Administrator,

J. A. New, J. W. Jones, A. C. Ayres, E. A. Brown, J. M. Winters, R. Denny and J. R. McFee, for appellant.

W. W. Woollen, Jr., for appellee.

BERKSHIRE, J.—This was an action in the court below, instituted by the appellant against the appellee to annul the letters of administration issued to the latter, and to remove him from his trust.

The complaint contains two paragraphs, to which separate demurrers were filed and sustained by the court, and the proper exceptions reserved. Judgment was rendered for want of a sufficient complaint, and from that judgment the appellant appeals, assigning as error the ruling of the court below in sustaining the demurrers to the paragraphs of the complaint.

There is not a great deal of difference in the two paragraphs of complaint. The first paragraph alleges that John Crowder, the decedent, departed this life intestate, in the year 1854, in the Dominion of Canada, and the appointment in a reasonable time thereafter of an administrator at the place of his death; that he had no estate of any character or kind in the county of Marion, or State of Indiana, on the 28th day of September, 1855, to be administered, but, notwithstanding, on that day one George W. Mears was appointed administrator of said estate by the court of common pleas for Marion county, State of Indiana, and continued in that capacity until the year 1858, when his resignation was accepted by the court; that in the same year, there being no assets of said decedent in the county of Marion, or in the State of Indiana, at the time of said Mears' appointment, and none having come into the State afterwards, or if so the same were fully administered by said Mears; by the same court one Alexander Graydon was appointed administrator *de bonis non* of said estate, and continued as such until the 13th day of March, 1863, at which time he reported to the court that he had made search for property and could find

Langsdale v. Woollen, Administrator.

nothing, and asked to be discharged ; that his report was approved, and he was finally discharged from his trust, and the said estate discontinued ; that on the 27th day of March, 1874, there never having come into the county of Marion, or State of Indiana, any assets or property of said decedent, and if so the same having been fully administered, on his own application the appellee was appointed, by the probate court, administrator *de bonis non* of said estate ; that during the administration of said Mears and said Graydon, respectively, a suit was instituted against the appellant to recover a balance claimed to be due arising out of the sale and purchase of a certain farm, but that such proceedings were afterwards had that the said suit was, by the said administrator, dismissed, and no further steps taken by them ; that when said appellee was appointed as such administrator said estate had been fully settled and discontinued, and that said court in making said appointment acted without its jurisdiction.

The only difference in the two paragraphs of the complaint is that in the second paragraph there is the additional averment that in the action brought by the appellee against the appellant a judgment was recovered on the — day of January, 1881, for the sum of \$2,032.52. One of the elementary rules of pleading is, that the averments in a pleading must be clear and unequivocal. *Bunnell v. Davisson*, 85 Ind. 557.

“The pleader is not at liberty to leave his pleading open to different constructions, and then take his choice between them.” *Van Etten v. Hurst*, 6 Hill, 311 (41 Am. Dec. 748) ; *United States v. Linn*, 1 Howard (U. S.), 104 ; *Atwood v. Caswell*, 19 Pick. 493.

. Facts must be stated directly and positively, and not indirectly nor in the alternative. *Stonsel v. Abrams*, 7 Blackf. 516 ; *Stone v. Graves*, 8 Mo. 148 (40 Am. Dec. 131) ; *Thompson v. Munger*, 15 Texas, 523 (65 Am. Dec. 176).

Neither paragraph avers in positive terms that there were no assets belonging to the estate within Marion county when

Langsdale v. Woollen, Administrator.

the several administrators were appointed. Taking the averments altogether, they neither deny nor affirm that there were assets, but allege that if there were any they had been fully administered before the appellee received his appointment.

It is averred that after the appellee had been appointed he brought an action against the appellant upon the same alleged cause of action upon which Mears and Graydon had sued him while they were acting as administrators, and in the first paragraph it is alleged that the action is still pending; in the second paragraph it is alleged that the action had been prosecuted successfully, and a judgment rendered for \$2,032.52, and though, as a conclusion of the pleader, it is alleged that the estate had been finally settled when the appellee received his letters as administrator, the facts stated do not bear out the conclusion, but show simply that the preceding administrators had failed to discover assets belonging to the estate, and were by the court discharged from further execution of the trust, and the estate discontinued.

We can not well understand how there could have been a final settlement of the estate, within the meaning of the statute, where no assets had been discovered on which to administer. Section 112, 2 G. & H. 517; *Langsdale v. Woollen*, 99 Ind. 575; *Roberts v. Spencer*, 112 Ind. 85.

It does not appear by positive averment that the appellant, during the time that the different administrators were seeking to enforce the claim which they asserted was due from him to their trust, was a resident of Marion county, Indiana, but there is no averment to the contrary; and from the facts and circumstances that are averred it is evident that he was a resident of said county. It is averred, among other things, that he was three times sued upon the claim in the courts of that county, and that he at no time claimed that that was not the county in which he resided.

If the appellant was a resident of Marion county, and he

Langsdale v. Woollen, Administrator.

was indebted to the estate as claimed, then there were assets in the county of Marion, State of Indiana, belonging to the estate to be administered, and the court of that county, which exercised probate jurisdiction, had jurisdiction to appoint an administrator to administer upon those assets. *Langsdale v. Woollen, supra*; 2 G. & H. 494, section 34; *Cureton v. Mills*, 13 S. C. 409 (36 Am. Rep. 700); *Kelly v. Kelly*, 9 Ala. 908 (44 Am. Dec. 469).

The presumption must be in favor of the jurisdiction of the common pleas court of Marion county, it being the court that exercised jurisdiction of all matters of probate at the time each of the said administrators was appointed, and being as to such matters a court of general jurisdiction. *Doe v. Bowen*, 8 Ind. 197; *Doe v. Harvey*, 3 Ind. 104; *Gerard v. Johnson*, 12 Ind. 636; *Spaulding v. Baldwin*, 31 Ind. 376; *Walker v. Hill*, 111 Ind. 223; *Lantz v. Maffett*, 102 Ind. 23; *Valle v. Fleming*, 19 Mo. 454; *Sims v. Gay*, 109 Ind. 501.

We are of the opinion that the first paragraph of the complaint is bad, because it does not allege that there were no assets belonging to said estate when the appellee was appointed administrator within the jurisdiction of the court, but the averments as to that important and jurisdictional fact are equivocal, and leave the mind in a state of uncertainty as to whether there were or were not assets within the jurisdiction of the court.

The second paragraph of the complaint is bad, not only for the reasons stated as to first paragraph, but because it shows, *prima facie* at least, that the appellant was indebted to the appellee's intestate in the sum of \$2,032.52.

The court committed no error in sustaining the demurrers to the two paragraphs of complaint.

Judgment affirmed, with costs.

ELLIOTT, C. J., took no part in the decision of this case.

Filed May 28, 1889; petition for a rehearing overruled Sept. 24, 1889.

Hart et al. v. The State, ex rel. Rock.

No. 13,146.

HART ET AL. v. THE STATE, EX REL. ROCK.

GRAVEL ROAD.—Contractor's Bond.—Mistake.—Mistakes in a bond given pursuant to the statute to secure the performance of a contract for the construction of a free gravel road, may be corrected, under section 1221, R. S. 1881, so as to give the bond the effect intended by the law.

SAME.—Liability of Sureties.—The obligors in a bond executed by a contractor to secure the construction of a free gravel road are not liable for debts incurred by the contractor in the prosecution of the work, in the absence of a condition to that effect, unless a mistake is averred and proved.

SAME.—Sale of Claims.—Champerty.—A sale of claims for work performed and materials furnished in the construction of a free gravel road is not champertous, but is authorized by the code, and the assignee becomes the real party in interest.

CHAMPERTY.—Assignment of Claim.—An assignment of a claim can not be defeated by the debtor by alleging facts showing that a champertous agreement was entered into by the plaintiff and the original holder of the claim at the time of the assignment.

From the Hancock Circuit Court.

W. R. Hough, for appellants.

J. A. New and *J. W. Jones*, for appellee.

ELLIOTT, C. J.—The complaint of the relator is based on a bond executed by Hays as principal, and the other appellees as sureties. The condition of the bond is thus expressed :

“The conditions of the above obligation are such that whereas, the above bound Orlando Hays has been awarded the contract for constructing sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, of the Pleasant Hill and Manilla Free Gravel Road, in Shelby county, Indiana, and has entered into a written contract with the engineer and superintendent of said free gravel road to construct and complete said sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, of said road on or before the — day of —, 188—, according to the specifications prepared therefor by

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132	405
120	83
159	572
159	573

Hart et al. v. The State, ex rel. Rock.

said engineer and superintendent, and in compliance with the provisions and requirements of the notice of the letting of the contract for the construction of said road :

“ Now, if said Orlando Hays shall construct and complete said sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, of said road, according to the provisions of the contract entered into with the engineer and superintendent, then this obligation to be void, otherwise to remain in full force and effect.”

It is averred that a written contract was entered into between Hays and the board of commissioners of Hancock county for the construction of the sections of the gravel road mentioned in the bond, and that the bond was executed under the provisions of the act of March 14th, 1877. It is also averred that by the mistake of the scrivener who drew the bond it was made payable to the board of commissioners instead of to the State of Indiana, and that by the further mistake of the scrivener the bond was not conditioned for the payment of debts incurred by the contractor in the prosecution of the work, or for the payment of laborers and persons furnishing material. It is further averred that the claims of the persons named were assigned to the relator ; that the contractor became indebted to the persons named for work and for materials, and the particulars of the indebtedness are properly set forth. The complaint also alleges that the relator made demand for payment of the sums due before the action was instituted.

The title of the act of March 14th, 1877, does not include more than one subject, and the provisions relating to the execution of bonds by contractors are fully within the title.

The decision in *Faurote v. State, ex rel.*, 110 Ind. 463, settles the question as to the right of the relator to have mistakes in the bond corrected. The bond was given pursuant to a public statute, and under the provisions of section 1221, R. S. 1881, the parties in interest had a right to have mistakes corrected so as to give the bond the effect the law intended it should have.

Hart *et al.* v. The State, *ex rel.* Rock.

The persons who performed labor and furnished materials had a right to sell their claims. A sale of such claims is not champertous. There is no more reason for holding such sales champertous than there is for holding the sale of a claim for work and labor done on a farm, or of a claim for merchandise. Our code expressly recognizes the right to sell and assign all such claims, and authorizes the assignee to maintain an action in his own name as the real party in interest.

After the sale and assignment of the claims to the relator, he became the real party in interest, and the demand was properly made by him.

The answer of the sureties is, in substance, this: The assignors and the relator, at the time the assignment was made, entered into an agreement wherein the relator undertook to collect the claims at his own expense, and when they were collected to pay to each of the claimants one-half of his claim "of the money which should be by him collected;" in consideration of this undertaking the assignors agreed that the relator should retain one-half of the amount collected on each claim to compensate himself for his services, and to reimburse him for costs and expenses incurred.

To this answer a demurrer was sustained, and this the appellant's counsel assert was error, because the agreement between the assignors and the relator was champertous and void. The rule invalidating champertous agreements is still in force in this State, although much restricted by the provisions of the code. *Scobey v. Ross*, 13 Ind. 117; *Quigley v. Thompson*, 53 Ind. 317; *Greenman v. Cohee*, 61 Ind. 201; *Board, etc., v. Jameson*, 86 Ind. 154, 161. The allegations of the answer would carry the case within our own decisions, and within those of other courts, if the question at issue arose directly on the contract. 3 Am. and Eng. Ency. of Law, 68. It would, indeed, be impossible to discern any difference in principle between this case and the cases of *Scobey v. Ross*, *supra*, *Coquillard v. Bearss*, 21 Ind. 479, and *Lafferty*

Hart et al. v. The State, ex rel. Rock.

v. *Jelley*, 22 Ind. 471, if the contract were relied upon as a defence by a party sued upon it, but here the parties who rely upon the contract are not endeavoring to prevent its enforcement directly against them, for what they seek to do is to defeat an assignment. If the action had been brought by the original claimants, no question of champerty would have arisen, so that the alleged champertous contract only comes into question collaterally. We, therefore, feel bound to hold under the ruling in *Allen v. Frazee*, 85 Ind. 283, that the assignment is not defeated.

We find no evidence of any mistake in the preparation of the bond, and we can not agree with the view of counsel that the statute of its own vigor imported conditions into the instrument. It may be true that to prove the mistake in naming the obligee, it is unnecessary to do more than prove the proceedings in which the bond was given, but more is necessary where it is sought to add a condition to the bond. As the instrument is written it simply obligates the sureties of the contractor to answer for his failure in his undertaking to construct and complete the sections of the road designated "according to the provisions of the contract entered into with the engineer and superintendent." We can not perceive any legal reason upon which the obligors can be held in this action without evidence that they agreed to be bound for debts due persons performing labor and furnishing materials. Some evidence must, in such cases as this, be given in proof of the averment of a mistake in reducing the contract to writing. Sureties can not be held beyond the plain import of their obligation, where, as here, the obligation is clear and unambiguous on its face, without some evidence of an intention or agreement to be bound beyond the terms and conditions of their bond. The board had a right to take a bond to secure the performance of the work according to the contract, and, so far as this record shows, this is the only bond that was taken. R. S. 1881, section 5095. At all events, there is no evidence that the

Hart *et al.* v. The State, *ex rel.* Rock.

sureties agreed to be bound beyond the term of the bond, or that the bond does not fully express the obligation of the sureties.

We do not understand our cases to decide, as counsel assert, that "in case the mistake is not patent a suggestion of such mistake in the complaint is sufficient for the case." It may be sufficient, as a matter of pleading, to suggest the mistake, but when it comes to the question of establishing a cause of action there must be evidence of the mistake or the plaintiff will fail. Where a bond appears to be complete and perfect on its face, with conditions fully expressed, a new condition can not be added, unless there is satisfactory evidence of a mistake. If the board of commissioners could not rightfully have accepted such a bond as the one involved in this controversy, in proceedings for the construction of roads, there might be some tincture of reason in the contention that the statute entered into it so fully as to supply conditions and terms; but it is plainly otherwise where, as here, the statute authorizes just such bonds as the one before us to be taken in proceedings such as those in which this bond was taken.

Judgment reversed, with instructions to sustain the appellant's motion for a new trial.

Filed May 28, 1889.

ON PETITION FOR REHEARING.

ELLIOTT, C. J.—Counsel for the appellee erroneously assume that there is a conflict between the opinion in this case and that of *Faurote v. State, ex rel.*, 110 Ind. 463. There is not the slightest conflict, for the ruling in the case cited is fully approved and followed. The counsel confuse the questions in the two cases; in the former the question arose upon a complaint containing proper allegations as to the scrivener's mistake in drafting the bond, while in the case before us the question is, can sureties be held beyond the terms of the bond, where the words are unambiguous, constitute a complete con-

Colchen v. Ninde et al.

tract and there is not a particle of evidence of any mistake, nor, indeed, an atom of evidence tending to show that the contract does not mean exactly what it says?

Petition overruled.

Filed September 18, 1889.

120 88
124 333
126 260
127 411

120 88
122 481

120 88
130 100
120 88
134 566
136 224

120 88
142 661

120 88
151 432
152 437
152 438

120 88
154 149

120 88
166 435

No. 13,887.

COLCHEN v. NINDE ET AL.

ARREST OF JUDGMENT.—*Motion.*—*Time of Making.*—A motion in arrest of judgment may not be made after judgment is rendered.

NEW TRIAL.—*Motion for.*—*Judgment before Disposed of.*—A motion for a new trial may be made at any time during the term at which the finding is announced, or on the first day of the succeeding term, where the finding is announced on the last day of a term, and a judgment rendered before such motion is disposed of is not final within the meaning of the statute regulating appeals.

SAME.—*Vacating Judgment.*—*Absence of Formal Order.*—Where a new trial is had and a new judgment is rendered, the effect is to vacate the previous judgment, although there may be no formal order setting it aside.

PLEADING.—*Complaint.*—*Defects Cured by Verdict.*—If a complaint states facts sufficient to bar another action for the same cause, it is sufficient after verdict to uphold the judgment, as the defects will be deemed cured.

SAME.—*Striking Out.*—*Harmless Error.*—There is no available error in striking out a paragraph of answer where the facts averred therein are admissible in evidence under another paragraph which remains in the record.

From the Adams Circuit Court.

C. J. Lutz, J. T. France and J. T. Merryman, for appellant.

R. S. Peterson and E. A. Huffman, for appellees.

Colchen v. Ninde *et al.*

BERKSHIRE, J.—The appellees were the plaintiffs in the court below, and the appellant and one John W. Rout the defendants.

On the 6th day of March, 1883, the appellees, in the Adams Circuit Court, recovered a judgment against the said John W. Rout for the sum of \$400 and costs, and had filed their petition in another action pending in said court brought by one Bremerkamp against said Rout and another for the payment of said judgment out of certain moneys in the hands of the clerk of said court, claimed by one Lucy Rout, and in consideration that the appellees would dismiss their said petition, allow their said judgment vacated, and new issues joined in said cause, and another trial thereof, the said John W. Rout as principal and the appellant as surety executed the obligation sued on in this action.

The appellant filed an answer to the complaint, in three paragraphs, the first being the general denial.

The second and third paragraphs were stricken out on motion, and the proper exception reserved by the appellant, and thereafter there was a trial by the court and a finding in favor of the appellees in the sum of \$491.24, which was, on the same day, followed by a proper judgment.

After the judgment was rendered, the appellant filed a motion for a new trial, which the court overruled, and then a motion in arrest of judgment, which was also overruled, and to the action of the court in overruling the said motions the proper exceptions were taken.

There are five errors assigned, three of which, the first, third and fifth, present the same question, viz., that the complaint does not state facts sufficient to constitute a cause of action.

The appellees present a preliminary question which we will first dispose of before considering the errors assigned.

They contend that the motion for a new trial and in arrest of judgment came too late, not having been made until after the rendition of the judgment.

Colchen v. Ninde *et al.*

The point is well taken as to the motion in arrest of judgment. *Hansher v. Hanshew*, 94 Ind. 208, and cases cited. The motion for a new trial could be made at any time during the term at which the finding of the court was announced, or on the first day of the next term if the finding was announced on the last day of the preceding term. Section 561, R. S. 1881; *Secor v. Souder*, 95 Ind. 95. But until the motion for a new trial was disposed of the judgment preceding it was not final within the meaning of the statute regulating appeals. *New York, etc., R. R. Co. v. Doane*, 105 Ind. 92.

The objection which is raised to the complaint is, that there is no copy of the bond, which is the foundation of the action, filed with it. If the statute (section 362, R. S. 1881), which requires the original or a copy of the writing which is the foundation of the action to be filed with the complaint, is not complied with, the pleading will not be good as against a demurrer. But when the sufficiency of the pleading is called in question after verdict, by a motion in arrest or by error assigned in this court, a different rule prevails; all intendments are taken in favor of the pleading, and if facts sufficient are stated to bar another suit for the same cause of action, the verdict cures all other defects, and the complaint will be held sufficient to uphold the judgment. *Donellan v. Hardy*, 57 Ind. 393; *Balliett v. Humphreys*, 78 Ind. 388; *Sims v. Dame*, 113 Ind. 127; *Chapell v. Shuee*, 117 Ind. 481; *Laverty v. State, ex rel.*, 109 Ind. 217; *Smith v. Smith*, 106 Ind. 43; *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380.

But in this case the statute above was properly complied with, the bond was copied in full in the pleading.

The second error assigned is that the court erred in striking out the second and third paragraphs of the appellant's answer, and the fourth is that it was error to overrule the motion for a new trial.

The ruling of the court in striking out the second paragraph of answer not being discussed by appellant's counsel

Colchen v. Ninde *et al.*

in his brief, to that extent the second assigned error is waived.

The facts alleged in the third paragraph of the answer, so far as material, could have been proven under the general denial. There is, therefore, no available error because of the ruling of the court in striking out the answer. It seems that the court struck the answers out for another reason than the one we have suggested, but as the right result was reached the reasons therefor are unimportant.

The evidence discloses the following facts occurring after the execution of the bond, viz.: A trial of the cause of action recited in the bond and a finding and judgment for the appellees, the issuing of an execution upon the judgment to the sheriff of Adams county, and a return of *nulla bona* thereon, and a refusal of the judgment defendant to pay the execution, or to turn out property to satisfy it when called upon by the officer holding the writ.

The point is made that there is a failure of proof tending to show that the judgment first obtained was set aside, and the petition that had been filed dismissed. It nowhere appears that the petition was ever prosecuted any further after the execution of the bond, and it appears from all the evidence in the case that appellees never realized anything on account of the petition. But the principal thing with John W. Rout in executing the bond was to get rid of the judgment and to obtain a new trial, claiming, as he did, that he had a defence to a part of the cause of action.

It does not appear by direct evidence that the judgment originally obtained was formally set aside; but it does appear that, after the execution of the bond, the cause was again tried, and the principal obligor afforded an opportunity to make his defence, and as the result of the last trial a new judgment was rendered. This had the effect to wipe out the first judgment, if it had not been done before. And, further, when the deputy sheriff went to Rout and demanded property, he did not, so far as the evidence discloses, make

 Qualter v. The State.

any claim that the appellees had not complied with the conditions of the contract on their part.

We think there is no merit in this appeal, and the judgment is affirmed, with five per cent. damages and costs.

Filed Sept. 19, 1889.

No. 15,060.

QUALTER v. THE STATE.

120 92
155 413

CRIMINAL LAW.—*Intoxicating Liquor.*—*Sale on Election Day.*—*Special Election in Different Ward.*—Under section 2098, R. S. 1881, it is unlawful for a licensed vender to sell intoxicating liquors on the day of a special election for councilman in a ward different from that in which his place of business is situate.

SAME.—*Affidavit.*—*Jurat.*—*Omission of Officer's Seal.*—Where the record affirmatively shows that the affidavit upon which the prosecution is founded was sworn to, the omission of the officer to attach his seal to the *jurat* is not of such materiality as to warrant a reversal of the judgment.

SAME.—*Sunday not Dies Juridicus.*—Sunday is not a judicial day, and is not to be computed in determining the number of days in which the business of a court has not been transacted; but if it were, a party who goes to trial after three days have passed without the transaction of business waives his right to object on that ground.

From the Tipton Circuit Court.

G. H. Gifford and J. M. Fippen, for appellant.

L. T. Michener, Attorney General, W. W. Mount, Prosecuting Attorney, and J. H. Gillett, for the State.

ELLIOTT, C. J.—A special election for councilman was held in the first ward of the city of Tipton on the 29th day of May, 1888, and on that day the appellant, who was a

Qualter v. The State.

licensed liquor seller, sold intoxicating liquor. His place of business, where the liquor was sold, was situated in the second ward of the city, in which ward no election was held, and forty rods distant from the voting place. The prosecution is founded on the statute forbidding the sale of intoxicating liquor on days on which elections are held, and on holidays. That statute declares that it shall be unlawful to sell "upon the day of any election in the township, town, or city where the same may be holden." R. S. 1881, section 2098.

There was an election held in the city of Tipton, and in that city the appellant did sell intoxicating liquor on the day the election was held. His act was within the express words of the statute, for it declares that it shall be unlawful to sell in any city wherein an election is holden. The offence of the appellant is clearly within the words of the statute, for it forbids a sale where "any election is holden," and applies to an entire town or city. Under the strict letter of the statute, evidence of an election in the city, and of a sale on the day of the election, makes out the offence defined. All elections are embraced in the language of the statute, and it would be legislation on the part of the courts to declare that only some elections were meant. We are not prepared to assent to the argument of counsel that the act of the appellant is not within the spirit of the statute. It is obvious that a dram shop in full operation across the street from the polls, or forty rods distant, although in another ward, might do full as much mischief as one within the ward boundaries. If we should adopt the view of appellant's counsel, we should not only legislate, but we should so far cripple the statute as to make it of little effect in remedying the evil it was plainly its object to repress.

The record affirmatively shows that the affidavit on which the prosecution is founded was sworn to, and the omission of the mayor to attach his seal to the *jurat* is not of such materiality, if, indeed, of any materiality at all, as to warrant a reversal.

Ex Parte Kilgore.

Sunday is not *dies juridicus*, and is not to be computed in determining the number of days in which the business of a court has not been transacted. There is no merit in appellant's argument that the judgment is void or erroneous because three days passed without the transaction of any business, for Sunday was one of the days which he includes in his reckoning.

The appellant agreed to a submission of the cause to the court for trial after the alleged improper cessation of business, and made no objection to the action of the court in suffering three days to elapse without transacting business, so that even if Sunday is to be reckoned as a judicial day, he is not in a situation to now successfully complain.

Judgment affirmed.

Filed Sept. 20, 1889.

No. 13,794.

EX PARTE KILGORE.

TRUST.—*Testamentary Appointment of Trustee, without Bond.*—*Power of Court to Require Bond.*—Where a testator by his will appoints his son trustee of an express trust thereby created, and provides that he shall not be required to give bond, but that for any breach of trust he may be removed and another appointed by the court, the court has no power to require the trustee so appointed by the testator to execute a bond for the faithful discharge of his duties.

SAME.—*Trustee with an Interest.*—*Removal.*—*Right to be Heard.*—Where a will provides that the testator's son shall have and hold in trust for his children "one full and equal fourth part of my property, real and personal, with the right to use any income or rents thereof to aid in raising and educating his children," the court has no power to arbitrarily re-

Ex Parte Kilgore.

move such trustee, without petition or notice, and without giving him an opportunity to be heard.

From the Delaware Circuit Court.

J. N. Templer and J. F. Sanders, for appellant.

J. W. Ryan, *contra*.

MITCHELL, J.—The fifth clause of the will of David Kilgore, who died in Delaware county, the owner of real and personal estate, reads substantially as follows: "My son David to have and hold in trust for his children now born, or which may hereafter be born, during his natural life, one full and equal fourth part of my property, real and personal, with the right to use any income or rents thereof, to aid in raising and educating his children, and he shall not be required to give bond as such trustee, but for any waste or abuse of trust, may be removed, and another appointed by the court."

It appears from the record that the trustee presented a petition to the Delaware Circuit Court, praying its order and direction in respect to certain matters pertaining to the trust. Before the petition was finally disposed of, the court, of its own motion, and without any reference to the matters embraced in the petition, entered an order requiring the trustee within ten days to give a bond in the penal sum of \$3,000, with approved freehold surety, for the faithful discharge of his duties as trustee under the will. This order was made over the objection of the trustee. It is recited in a bill of exceptions set out in the record, that the trustee having failed and refused to give bond, and to comply with the order of the court, the court thereupon, of its own motion, ordered that he be removed from his trust as trustee under the will.

It further appears by bill of exceptions that the court had made certain orders, the purport of which, with the exception of the order to file a bond, does not very clearly appear, and that the trustee had failed to comply with the orders so made. Thereupon, without any petition charging any viola-

Ex Parte Kilgore.

tion or attempted neglect of duty, and without any hearing or previous notice, the court removed him upon its own motion.

The record presents two questions for decision :

1. Had the court power to require the trustee to execute a bond for the faithful discharge of his duties notwithstanding the direction of the testator that he should not be required to give bond?

2. Had the court the power, of its own motion, to remove the trustee, without petition or motion, and without previous notice and an opportunity to be heard?

Both the foregoing inquiries must receive a negative answer.

Where an express trust is created by will or deed, and the trustee is vested with plenary power, so as not to require the aid or appointment of the court in the execution of the trust, the court has no power to interfere and require the execution of a bond, in opposition to the declared wishes of the author of the trust, except it be done in pursuance of some express statutory requirement. On the other hand, where the power or authority of a trustee to do an act, or make a sale, is derived from, or where he is appointed by, the court, and the statute requires the execution of a bond as a condition upon which the appointment may be made, or the power exercised, the power can be conferred only upon the statutory conditions, without regard to the wishes expressed by the author of the trust. *Iles v. Martin*, 69 Ind. 114; *Perry Trusts*, section 262.

A testator has a right to dispose of his property in the manner deemed most satisfactory to him, and it his province to repose a special trust and confidence in whomsoever he chooses. If he appoints a trustee and vests him with power to execute the trust without the aid or appointment of the court, his express directions exempting the trustee from giving bond can not be disregarded without showing that the trust estate is being wasted, and that the condition and cir-

Ex Parte Kilgore.

umstances of the trustee are wholly different from what they were when the appointment was made. Where one has been appointed executor who requires the issuance of letters with the will annexed, other principles control.

It is undeniably true that trustees and trust estates are, by the express terms of the statute, placed under the equitable control of the court having jurisdiction thereof, for the preservation of the funds and carrying out the purposes of the trust, and that, in a proper case, the court may, by virtue of its inherent chancery jurisdiction over trust estates, require the execution of a bond for the faithful administration of the trust. *Thiebaud v. Dufour*, 54 Ind. 320; *State, ex rel., v. Roubenbrush*, 114 Ind. 347; *Tucker v. State, ex rel.*, 72 Ind. 242. If, however, it be the clearly expressed purpose of the author of the trust that the trustee should not be required to execute a bond, it is not within the power of the court to set aside an unequivocal provision of the will or deed by ordering the execution of a bond, except its aid or jurisdiction is invoked in the course of a matter or proceeding in which the statute requires the filing of a bond. The testator appointed his son trustee of an express trust. He declared, in unequivocal language, that the trustee should not be required to give a bond, but that if he abused his trust he should be removed and another appointed in his place. What the testator desired was, that the trust should be faithfully administered by his son, without a bond, and that if he failed so to administer it then he should be removed. It was not the execution of a bond he wanted in case the confidence he had reposed should be abused. What he expressly provided for in such contingency was, that the trust should be committed to other hands, without involving his son in further complications. The testator doubtless had abundant reason for making the provision he did. The court had no power to change it. The proceeding before the court, at the time the order was made, was not one in

Ex Parte Kilgore.

which the statute required the filing of a bond. The order requiring the trustee to file a bond was therefore erroneous.

Coming now to the second question, it is apparent at once that the will made the appellant the trustee of an active trust in which he had a beneficial interest of a pecuniary character. It gave him the right to use and enjoy the income and rents of one-fourth of the testator's real and personal estate, to aid him in raising and educating his children. He had the right to take the possession and management of the trust estate, and continue to use and manage it as long as he remained faithful to the purposes of the trust. This constituted a valuable right, of which he could not be deprived, except for some abuse or attempted violation of the duties of his trust, upon petition by, or on behalf of, some person interested, and after due notice, and an opportunity to be heard. *In re Livingston*, 34 N. Y. 555; *McPherson v. Cox*, 96 U. S. 404.

That a court of chancery has power, independently of any statutory provision, or of any directions contained in the instrument, to remove a trustee for good cause shown, is well established. *People v. Norton*, 9 N. Y. 176; *Pomeroy Eq. Jur.*, section 1086. The power of the court in that respect is as broad and comprehensive as the exigencies of any case may require. In exercising its jurisdiction, the court does not, however, act arbitrarily, but upon certain well defined principles, and after affording the trustee an opportunity to answer the charges made against him, and giving him ample opportunity to be heard. *Perry Trusts*, sections 817, 818.

Whatever causes may have existed for the removal of the trustee in the present case, as it is affirmatively shown that he was not removed upon any charges preferred or after a hearing and consideration of the case, the proceedings of the court were, to say the least, erroneous.

The judgment is reversed, with costs.

Filed Sept. 20, 1889.

 Stayner v. Joyce.

No. 13,685.

STAYNER v. JOYCE.

130	99
147	174
120	99
150	162
120	99
187	592
187	593

EVIDENCE.—Promissory Note.—Alterations.—A promissory note is admissible in evidence, after proof of the genuineness of the signature, without evidence being first introduced in explanation of alterations appearing on its face.

SAME.—Witness.—Impeachment.—Testimony on Former Trial.—Stenographer's Report of.—The stenographer's long-hand report of the testimony given by a witness on a former trial of a cause is not competent evidence to contradict or impeach such witness; but, if the proper foundation is laid, the stenographer may testify as to statements made by the witness on the former trial.

INSTRUCTIONS TO JURY.—Special Verdict.—Where a special verdict has been requested, it is not error to refuse to give a general instruction as to the law of the case.

ARGUMENT OF COUNSEL.—Right to Open and Close.—In an action upon a promissory note the plaintiff is entitled to open and close the argument, where the issue is joined by a general denial of the complaint.

From the Allen Superior Court.

F. S. Roby and *J. M. Somers*, for appellant.

J. A. Woodhull and *W. M. Brown*, for appellee.

OLDS, J.—This is an action on a promissory note. The appellant, the defendant below, answered, denying the execution of the note under oath. There was a trial, resulting in a verdict and judgment for appellee against the appellant for the amount of the note.

Appellant filed a motion for a new trial, which was overruled, and exceptions, and numerous errors are assigned.

The first alleged error discussed is the admission of the note sued on in evidence before the introduction of evidence explaining the alterations appearing upon its face. The word "day" in the note was crossed out, and the word "year" written above it; also the words "after maturity" were crossed out, making the note sued upon a note payable

Stayner v. Joyce.

one year after date, bearing interest from date, instead of a note payable one day after date, with interest after maturity. Upon proof being made of the genuineness of the signature to the note, the court permitted its introduction in evidence over the defendant's objection. This ruling of the court is correct, and is in harmony with the rule laid down in *Greenleaf* and the decisions of this court. 1 *Greenleaf Evidence*, section 564; *Stoner v. Ellis*, 6 Ind. 152; *Brooks v. Allen*, 62 Ind. 401; *Pate v. First Nat'l Bank of Aurora*, 63 Ind. 254.

The next alleged error discussed is the refusal of the court to give to the jury instruction number one requested by appellant. There was a request for a special verdict, and a special verdict was returned. It was the duty of the court to instruct the jury as to the nature of the action and the issues, and as to the form of their verdict, but general instructions as to the law of the case were improper.

The instruction asked for by the appellant, and refused by the court, was a general instruction as to the law of the case relating to the issues joined by the plea of *non est factum*, and was therefore properly refused by the court. It was the duty of the jury to find the facts relating to the signing, execution, and alteration of the note, leaving it for the court to determine the rights and liabilities of the parties from such facts. *Toler v. Keiher*, 81 Ind. 383; *Woollen v. Wire*, 110 Ind. 251; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

It is stated by counsel that the court gave no instructions to the jury, but no question is presented relating to such neglect of duty by the court.

Counsel have also assigned as error, and urge as a reason for a new trial, that the court erred in refusing to allow the appellant to open and close the argument of the case. This we think can not be seriously contended for, in view of the fact that an issue was joined by a general denial of the complaint, putting in issue the execution of the note sued on, and which was the main issue submitted for trial.

Stayner v. Joyce.

The last error assigned and discussed is as to the introduction of evidence. Upon a former trial of this cause, Mr. Logan, a stenographer, took the evidence of William P. Stayner, and upon this trial of the case Mr. Logan was sworn as a witness, and testified to having taken the evidence of Stayner in short-hand on the former trial, and that he had transcribed it into long-hand, and thereupon appellant then offered such long-hand report of Stayner's testimony on the former trial in evidence.

It is not made to appear that such evidence was at all competent. It would be competent to prove by the stenographer that a witness had testified to statements on a former trial contradicting statements testified to at a subsequent one, but it would be necessary to lay the foundation for such contradictory evidence by calling the attention of the witness to his former statements, and asking him as to his having made such statements. If the witness denied having made the statements, then it would be proper to prove that he did make the statements inquired about; but in this case no such foundation was laid for contradicting the witness, and even if there had been, the long-hand notes of his testimony as transcribed by the stenographer would not be competent evidence to contradict or impeach the witness.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Sept. 20, 1889.

Proctor *et al.* v. Cole.

No. 13,784.

PROCTOR ET AL. v. COLE.

SET-OFF.—Mutuality.—Promissory Note.—Mutuality is essential to the validity of a set-off, and a defendant can not use a promissory note in which a third person has an interest as a set-off against a claim asserted by the plaintiff.

SAME.—Evidence.—Where a defendant offers a promissory note as a set-off, the contract under which he claims to be the owner thereof is admissible in evidence to show that he has not such an interest in the note as entitles him to use it as a set-off.

PROMISSORY NOTE.—Ownership.—Judgment.—Estoppel.—Where one who has an interest in a promissory note is not a party to an action in which the ownership of the note is brought in question, the judgment rendered in that action does not affect his rights.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

J. H. Baker and *J. H. Defrees, Jr.*, for appellee.

COFFEY, J.—This was an action by the appellee to foreclose a mortgage against the appellants. The only questions in the case arise upon exception to the refusal of the court to grant a new trial, and upon exceptions to the conclusions of law upon the special finding of facts.

The following special finding of the facts in the cause was made by the court :

“The parties to this cause having requested that the facts proven in the trial thereof be found specially by the court, I find that the following facts were proven on the trial :

“1. On the 31st of January, 1880, the defendant, William Proctor, executed a series of notes, of which the note in suit was the second to come due. This note was for one thousand dollars, due in nine months, payable to Henderson Cole, or order, with six per cent. interest and attorney's fees, at the St. Joseph Valley Bank, Elkhart, Indiana.

Proctor et al. v. Cole.

"2. On the same day, and to secure these notes, including the note in suit, the defendants, William Proctor, and Frances Proctor, his wife, executed a mortgage to Henderson Cole on the following described real estate owned by them in Elkhart county, Indiana, to wit: Commencing twenty-seven (27) feet south of the northeast corner of lot number sixteen (16), corner Main and Jackson streets, in the original plat of the town, now city, of Elkhart; thence westwardly parallel with said Jackson street one hundred and one (101) feet; thence southwardly parallel with said Main street thirteen (13) feet; thence westwardly parallel with said Jackson street (20) feet; thence southwardly parallel with said Main street fourteen (14) feet; thence east parallel with said Jackson street one hundred and twenty-one (121) feet to Main street; thence northwardly with said Main street to the place of beginning twenty-seven (27) feet. This mortgage was duly acknowledged on the same day, and, on the 2d day of February, 1880, was duly recorded in mortgage record 24, on page 89, of the records of Elkhart county, Indiana.

"3. On the 23d day of February, 1880, Henderson Cole sold and assigned the note in suit to the plaintiff. The assignment was not endorsed on the note at the time, but a written assignment was made on a separate paper in these words:

" 'ELKHART, Feb'y 23, 1880.

" 'For value received, I sell, assign, and transfer to Erastus B. Cole three certain notes signed by William Proctor, dated January 1, 1880. One for one thousand dollars, due in nine months from date. The second for one thousand dollars, due in eighteen months from date. The third one for one thousand eighty-eight $\frac{84}{100}$ dollars, due twenty-four months from date, all payable at the St. Joe. Valley Bank.

" 'HENDERSON COLE.'

"At the same time, Henderson Cole delivered to the plaintiff a written order to his attorney, in whose possession the

Proctor *et al.* v. Cole.

notes then were, asking him to deliver the notes to the plaintiff. The order was in these words :

“ ‘ ELKHART, Feb’y 23, 1880.

“ ‘ MR. MITCHELL—*Sir* : Please let my son, E. B. Cole, have those Proctor notes, and oblige. H. COLE.’

“ On this order the plaintiff got the notes on the 26th day of February, and on that day Henderson Cole endorsed them to the plaintiff. That said endorsement was made after the plaintiff had notice of the injunction. The endorsement on the note in suit was in these words :

“ ‘ February 23, 1880.

“ ‘ Pay to E. B. Cole, or order. HENDERSON COLE.’

“ Prior to this time the plaintiff had advanced to Henderson Cole, in payments, from \$600 to \$800, which he had agreed to repay whenever he was able, and the note in suit was assigned to the plaintiff in payment of that indebtedness. There is now due on the note in suit \$1,506.50, including an attorney’s fee of \$100.

“ 4. On the 15th day of April, 1869, Henderson Cole executed a note for \$2,000, payable with ten per cent. interest, and without relief from valuation laws, to one M. E. Cole. This note was afterwards endorsed to one A. S. Cook, and, afterwards, on the 25th day of February, 1880, it was endorsed by A. S. Wells and P. Wells to the defendant, William Proctor, without recourse. At the same time, when this latter endorsement was made, and as a part of the same transaction, an agreement in writing was entered into between the said A. S. Wells and P. Wells, and the said William Proctor, which agreement was in these words :

“ ‘ 5. This memorandum of agreement, made this 25th day of February, 1880, between William Proctor and Alma S. Wells [witnesseth that whereas Alma S. Wells], has endorsed a certain note, dated April 15th, 1869, for \$2,000 to William Proctor, executed by Henderson Cole to M. E. Cole, and by said M. E. Cole endorsed to Alma Sophia Cook, since intermarried with P. Wells ; now in consideration hereof, said William Proctor has paid one dollar

Proctor et al. v. Cole.

in cash, and agrees to pay said A. S. Wells an amount equal to one-half of the net proceeds he may be able to make out of said note either directly by way of collection, or indirectly by way of set-off; and, if said Proctor should make nothing, he shall pay said Alma S. Wells nothing; nor, in such case, shall she be liable to him for any costs and expenses he may pay or be liable for; the net proceeds shall be found by deducting all court costs and attorney's fees paid by said Proctor in attempting to collect said notes.

“ ‘ WM. PROCTOR.

“ ‘ A. S. WELLS,

“ ‘ By P. WELLS.’

“ 6. On the same day on which this assignment was made, the defendant, William Proctor, brought suit in the Elkhart Circuit Court against Henderson Cole on the note assigned to him by A. S. Wells, and, on the same day, February 25th, 1880, he obtained a restraining order restraining Henderson Cole from disposing of the note here in suit, and this order was duly served on him the same night, and such other steps were taken that, at the February term, 1880, the injunction was made perpetual, and Proctor also recovered judgment on the note against Henderson Cole for \$4,198. The plaintiff in this case, Erastus B. Cole, was not a party to that suit, and William Proctor first learned that the note here in suit had been transferred by Henderson Cole to him on the second day after the temporary order restraining him was granted.

“ 7. There is now due on the judgment in favor of William Proctor against Henderson Cole the sum of \$5,855.22.

“ 8. On the 13th day of April, 1880, William Proctor brought a suit against Erastus B. Cole, the plaintiff in this action, and in his complaint he alleged that on the 31st day of January, 1880, he executed to one Henderson Cole his three several promissory notes, the note here in suit being one of them, due respectively in nine, eighteen and twenty-four months, drawing interest at six per cent. per annum,

Proctor et al. v. Cole.

the two first maturing notes being for \$1,000 each, and the last being for \$1,088,80; each of said notes was payable to the order of said Henderson Cole, at the St. Joseph Valley Bank, of Elkhart, Indiana, drawing interest at six per cent. per annum, and were negotiable commercial paper; that, on the 25th day of February, 1880, the said Proctor purchased, for a valuable consideration, a certain promissory note executed by Henderson Cole on the 15th day of April, 1869, due in one year, promising to pay the sum of two thousand dollars with interest at ten per cent. per annum until paid, payable to the order of M. E. Cole, and by him endorsed: 'Pay Alma Sophia Cook or order. M. E. Cole, July 14, 1869;' that said Alma S. Cook afterwards intermarried with one P. Wells, and that said note was, at the time of the purchase by this plaintiff, endorsed by said A. S. Wells: 'Pay William Proctor, without recourse. A. S. Wells, P. Wells;' and that thereby the said Proctor became the legal owner and holder of said note; and he further says that at the time he so took and received said note he had no notice or knowledge that said Henderson Cole had transferred any of the notes executed by said Proctor as aforesaid; that on the same day, to wit, the 25th day of February, 1880, said note executed by Henderson Cole being due and wholly unpaid, he brought suit in this court on said note against said maker, and procured an injunction from this court, in due form of law, enjoining said Henderson Cole from in any manner transferring or disposing of said notes so executed by this plaintiff Proctor, which notice of restraining order and injunction was, at once, duly served on said Henderson Cole by the sheriff of said county; that after the service of said notice of injunction and restraining order, and after said Erastus B. Cole had full notice thereof, said Henderson Cole endorsed said note in blank, and transferred said note executed by this plaintiff, Proctor, to said Erastus B. Cole without consideration; that said Erastus B. Cole, who was then, and still is, wholly insolvent, with intent to cheat and defraud this plain-

Proctor et al. v. Cole.

tiff, Proctor, at once took said two notes, maturing in eighteen and twenty-four months, and endorsed them to one Reuben Cole, at Niles, in the State of Michigan, and received therefor the sum of fifteen hundred dollars in cash, and the note of said Reuben Cole for the sum of five hundred dollars, dated the first of March, 1880, due in seventeen months, with interest at the rate of six per cent per annum, payable to the order of said Erastus B. Cole, at the First National Bank of Elkhart, Indiana; that said Erastus B. Cole returned to Elkhart, Indiana, and paid over to said Henderson Cole, who was his father, one thousand dollars of the money he so received of his uncle, Reuben Cole, and retained in his possession the remaining five hundred dollars in cash, and the first one of said notes executed by the plaintiff Proctor, maturing in nine months; that said Henderson Cole is now, and for many years last past has been, wholly insolvent, with no property or means whatever, save and except the said debt owing to him by the said plaintiff, Proctor; and said Erastus B. Cole was ordered to turn over the five hundred dollars in cash received by the said Reuben Cole, and said note executed by this plaintiff, Proctor, maturing in nine months; that said Erastus B. Cole at once turned over to the sheriff said two notes, and gave bond for the payment of the said five hundred dollars in cash, but that said Henderson Cole at once, and before he could be arrested, departed out of and from this State, taking with him said one thousand dollars in cash. He further says that Reuben Cole is a non-resident of this State, and he does not know whether he is solvent or not, but charges that he is insolvent; he further says that by the aforesaid evil and unlawful acts of said Erastus B. Cole he was damaged in the sum of four thousand dollars; he further says, that on the 12th day of April, 1880, he duly recovered judgment in his favor in his said suit in this court against said Henderson Cole for the sum of \$4,198 and costs, and obtained a perpetual injunction restraining and enjoining said Henderson Cole, and all other persons

Proctor et al. v. Cole.

claiming by, through, or under him, with notice of said restraining order issued by this court on the 25th day of February, 1880, from asserting any right or claim to collect or enforce any one of said notes executed by this plaintiff, Proctor, to said Henderson Cole. Wherefore he, Proctor, asks judgment for four thousand dollars, and that said Erastus B. Cole be adjudged a claimant of said notes with notice of said restraining order, and to be bound and restrained thereby; and the plaintiff further prays judgment for three thousand dollars damages, and, as said Erastus B. Cole is also insolvent, he prays that his rights to defend himself against said notes in the hands of any other person may be saved to him, and he prays all other proper relief.

"9. To this action, the plaintiff in this case appeared and answered by an answer in two paragraphs, substantially as follows: in the first paragraph he admitted that said Proctor executed his several notes payable to Henderson Cole, as alleged, and that said Proctor, for the nominal consideration of one dollar, procured a note to be assigned to him by one A. S. Wells, under an agreement that said Proctor should make out of said note what he could and pay the said Wells one-half the proceeds, but the defendant Cole, the now plaintiff in this action, averred that said Proctor ought not to have said action, for that before the said note was transferred as above mentioned to said Proctor, this defendant, now the plaintiff, had, for a valuable consideration to the said Henderson Cole paid, become the equitable owner of said notes in said Plaintiff Proctor's complaint mentioned; that, in consideration of money paid to said Henderson Cole, and for money laid out and expended for his use and benefit, amounting in the aggregate to between eight and nine hundred dollars, which the said Henderson Cole owed him, the said Henderson Cole sold, and by a written agreement undertook to transfer, to said Erastus B. Cole, said note first falling due—being the note now here in suit—mentioned in said Proctor's complaint; and in consideration that said Hender-

Proctor et al. v. Cole.

son Cole was indebted to the defendant Erastus B. Cole, and to his sister, in the sum of three thousand dollars for moneys due to them from their deceased mother's estate, the said Henderson Cole transferred to the said Erastus B. Cole, by writing, before the plaintiff Proctor became the owner of said note so procured against said Henderson Cole, as aforesaid, the other two notes mentioned; that the said Henderson Cole, being so indebted to the said defendant Erastus B. Cole and his sister as aforesaid, by agreement between himself, his sister and said Cole, he executed and delivered to the defendant Erastus B. Cole, on the 23d day of February, 1880, a written assignment of said notes, which was taken and received in payment of said indebtedness aforesaid; that said notes at the date of said agreement and assignment were not in the possession of said Henderson Cole, but were in the custody of his attorneys at Goshen; that, on the same day on which the said agreement was made, he received an order for said notes; that, on the 26th day of February, 1880, he received the said notes, and the same were endorsed to him in writing by said Henderson Cole, for the purpose of transferring to him the legal title, this defendant having previously become the equitable owner in the manner hereinbefore stated.

"10. In the second paragraph of his answer, the said Erastus B. Cole answered, substantially, as follows: That the plaintiff herein, William Proctor, ought not to have his action against him, for that said Proctor took, and now has, the legal title to said notes and the judgment thereon rendered against Henderson Cole, upon the following express trust and confidence, expressed in writing in an agreement between himself and A. S. Wells, that he should take the legal title to said note, and whatever sum he could realize therefrom above the cost of litigation, either by bringing suit thereon against said Cole, or by making the same a set-off against the notes mentioned in plaintiff Proctor's complaint, should be equally divided between the said Proctor and the said A.

Proctor *et al.* v. Cole.

S. Wells; that said Proctor refused to purchase said note, and does not now own said note or judgment, but holds the same on the trust above mentioned; that before said Proctor received said note on the trust aforesaid, this defendant, Erastus B. Cole, became the equitable owner of said notes, for a valuable consideration theretofore paid to said Henderson Cole, and that said notes were endorsed to him, after said note against Henderson Cole was received as aforesaid, in order to invest him, Erastus B. Cole, with the legal title thereto, and for no other purpose.

"11. To these answers so filed, the said William Proctor filed a reply in general denial.

"12. Thereupon, on the issues so formed, the cause was submitted to this court for trial, and the court, having heard the evidence, found for the defendant therein, the plaintiff in this action, and adjudged that said William Proctor take nothing by his complaint; that Erastus B. Cole became and was the owner of said notes, including the one in suit on the 23d day of February, 1880, and was entitled to the possession of the three notes, including the one in suit, and that said Proctor did not obtain his alleged set-off until after the 23d day of February, 1880.

WILBER L. STONEX,

"Special Judge."

Upon the filing of this special finding of the facts, the appellants filed a motion for a new trial, alleging as a reason therefor that the court erred in permitting the plaintiff to read in evidence the contract of purchase between William Proctor and Alma S. Wells. The court overruled said motion, and the appellants excepted.

The court then stated its conclusions of law upon said facts as follows:

First. The plaintiff is entitled to recover from the defendant, William Proctor, the sum of \$1,520.25, and to the foreclosure of his mortgage against all the defendants.

Second. That the defendant is not entitled to have his

Proctor *et al.* v. Cole.

judgment against Henderson Cole set off against the plaintiff's claim.

Thereupon judgment was rendered against the appellant, William Proctor, and a decree of foreclosure against all the defendants in the action.

It is argued at great length, and with much earnestness, that the court erred in its conclusion that the appellants were not entitled to set off the judgment rendered against Henderson Cole against the claim of the plaintiff in this action.

It would seem to be a sufficient answer to that argument to say that that question was settled in the case of *Proctor v. Cole*, 104 Ind. 373.

In speaking of the claim upon which the judgment against Henderson Cole was rendered, and of the contract under which the appellant William Proctor acquired it, ELLIOTT, J., said: "The assignment of the note relied on as a set-off did not make the appellant the real party in interest, as to the entire proceeds of the note; the utmost that can be granted is, that he became the owner of one-half of the proceeds, and no more. If Mrs. Wells was entitled to one-half of the proceeds, she is to that extent a real party in interest. Conceding, but by no means deciding, that the appellant has a real interest in one-half of the avails of the note obtained from Mrs. Wells, he is still not in a position to defeat the appellee. This we affirm, because he can not use a note in which another has an interest as a set-off. Our decisions are uniformly to the effect that the claim asserted as a set-off must be held by the party who asserts it, and not by him and another jointly. Mutuality is essential to the validity of a set-off." To the same effect is the case of *Proctor v. Cole*, 115 Ind. 15.

We see no reason to change the conclusion reached in each of these cases, and we think they settle, beyond cavil, that appellant William Proctor does not stand in a situation to use the claim acquired from Mrs. Wells as a set-off against the claim in suit.

Proctor et al. v. Cole.

It is further contended that the judgment in favor of the appellant, William Proctor, against Henderson Cole, is conclusive against the appellee in this case upon the question of the ownership of the Wells note. We do not think so. The suit in that case was commenced and judgment rendered after the appellee acquired an interest in the note in suit. The appellee was not a party to that suit. To hold that the judgment in that case is conclusive against the appellee would be to hold that he might be deprived of one of his defences without the opportunity of being heard. The doctrine is elementary, and is so well known that it needs no citation of authorities, that a person is not bound by a proceeding in court to which he is not a party and in which he had no opportunity of being heard.

We do not think the court erred in admitting in evidence the contract under which the appellant, William Proctor, claimed to have purchased the Wells note. It was competent for the appellee to show on the trial of the cause that the appellant had no such interest in that note as would enable him to use it as a set-off in this case. The contract under which he claimed to be the owner of it tended to prove that fact.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

MITCHELL, J., took no part in the decision of this case.

Filed Sept. 20, 1889.

The State, *ex rel.* Peter, *v.* Keifer *et al.*

No. 13,822.

THE STATE, EX REL. PETER, *v.* KEIFER ET AL.

TOWNSHIP TRUSTEE.—*Certificate of Allowance—Assignment.—Individual Act.—Liability on Bond.*—The act of a township trustee in assigning a certificate of allowance for services, and afterwards procuring a duplicate certificate and taking credit therefor in his settlement with the county commissioners, is an individual act, and creates no liability in favor of the assignee on the trustee's official bond.

From the Perry Circuit Court.

E. E. Drumb, for appellant.

W. Henning and *E. C. Vance*, for appellees.

OLDS, J.—This is an action by the appellant against the appellees, on the bond of the appellee Keifer, as trustee of Troy township, in Perry county.

The breach of the bond assigned in the complaint is that Keifer, as such trustee, made out and presented to the board of commissioners of Perry county, at the August term, 1883, his itemized account for services as required by law, amounting to \$214, which was examined and allowed by said board of commissioners; that said Keifer procured a certificate from the auditor of said county, stating said sum had been allowed to said Keifer as trustee for his services, and that he sold and transferred said certificate, and his claim for services, to one James M. Comb, who afterwards sold and assigned the same to the appellant, James Peter; that afterwards said Keifer procured a duplicate certificate from the auditor of said county, and in a settlement with the board of commissioners said Keifer took credit for said sum so allowed to him, and filed the duplicate certificate as a voucher for said amount. Copies of the bond and certificate of the auditor were filed with the complaint. The certificate of the

The State, *ex rel.* Peter, *v.* Keifer *et al.*

auditor states: "That at a settlement with the board of commissioners of said county, on the 9th day of August, 1883, Lawrence Keifer, trustee of Troy township, was allowed the sum of two hundred and fourteen dollars for his services as such trustee to said date."

The appellee demurred to the complaint, for cause that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained, exceptions reserved, and the ruling assigned as error.

It is contended by counsel for appellant that the transfer and assignment of the certificate created an indebtedness on the part of the township to the appellant, which it was the duty of Keifer, as trustee, to pay, and a failure to pay the same constituted a breach of his bond. The only condition of the bond which it can be contended has been violated is that which provides that he "shall well and faithfully discharge the duties of said office according to law." The indebtedness to appellant from the township, if any indebtedness existed, was created by the assignment and transfer by Keifer of his claim for services. Such assignment and transfer were not a part of the duties of Keifer as trustee, nor does the law contemplate or authorize the doing of any such official act; and of this, persons dealing with him and taking an assignment of his claim were bound to take knowledge. It does not appear from the complaint what was the character of the services rendered for which the allowance was made; a part of the compensation for the services of a trustee is paid out of the township funds, which he has in his hands, and the trustee is liable to account for the township funds which may come into his hands, less the amount due to him for such services as are to be paid for out of that fund; and if the allowance was for such services as are payable out of the township funds, and he had township funds to that amount, or in excess of the sum on hand at the time of the allowance, there would be no indebtedness existing from the township to Keifer as trustee, but Keifer's liability

 Murphy v. The State.

for township funds **would** be reduced the amount due him from such fund for services as **trustee**. If the allowance to Keifer as trustee was for services rendered **as** overseer of the poor, which was payable out of the funds of the county on order of the board of commissioners, then it would not be a debt the township would have to pay, as contended by counsel for the appellant; and if he assigned his claim before it was paid it would be the duty of the assignee to notify the board of commissioners before payment, else a payment to Keifer would be good. *State, ex rel., v. Givan*, 45 Ind. 267; *State, ex rel., v. Kent*, 53 Ind. 112; *State, ex rel., v. Fleming*, 46 Ind. 206; *Carey v. State, ex rel.*, 34 Ind. 105; *Jenkins v. Lemonds*, 29 Ind. 294; *Doepfner v. State, ex rel.*, 36 Ind. 111.

In any event, the acts complained of in this case were the individual acts of Keifer, and do not show any failure or neglect of his official duties as township trustee, creating a liability on the bond. The demurrer to the complaint was properly sustained.

Judgment affirmed, with costs.

Filed Sept. 24, 1889.

No. 15,016.

MURPHY v. THE STATE.

120	115
1155	120

CRIMINAL LAW.—*Rape upon Child under Twelve Years Old.*—*Information.*—

Where an information charges rape upon a female child under twelve years of age, it is not necessary to allege that she was ravished forcibly and against her will.

SAME.—*Assault and Battery with Intent to Commit Rape.*—*Child under Twelve Years Old.*—*Resistance not Necessary to Constitute Offence.*—Under an infor-

Murphy v. The State.

mation charging rape upon a child less than twelve years old, there may be a conviction for assault and battery with intent to commit rape, without evidence tending to show that the defendant's advances were resisted by the child, or that she was incapable of resisting. *Stephens v. State*, 107 Ind. 185, overruled.

SAME.—Touching of Person.—Failure of Proof.—A conviction for assault and battery with intent to commit rape upon a child under twelve years of age, is not sustained where there is no proof that the defendant touched the person of the child, or that he did any act from which a touching can be inferred.

From the Sullivan Circuit Court.

W. S. Maple, for appellant.

W. C. Hultz, Prosecuting Attorney, and *O. B. Harris*, for the State.

BERKSHIRE, J.—The appellant was tried upon an information and sentenced to the State's prison for two years. The particular crime with which he was charged was that of rape upon Elsie Levitt, a female child of the age of six years. The crime for which he was convicted was that of an assault and battery with intent to commit a rape upon the said child. There was a motion to quash the indictment.

The objection made to the information was, that it did not allege that the child was ravished forcibly and against her will.

These allegations are not necessary when the female is under the age of twelve years. In that event the law conclusively presumes that she is incapable of giving her consent, and declares the mere act of sexual intercourse a crime.

There was a motion for a new trial overruled, and an exception taken by the appellee. But one question is presented for our consideration, which is the sufficiency of the evidence to support the conviction.

We are referred to the case of *Stephens v. State*, 107 Ind. 185, and it is correctly contended by counsel for the appellant that, under the law as ruled in that case, the judgment should be reversed, for the reason that there is not only a failure to prove that the appellant touched the person of

Murphy v. The State.

Elsie Levitt on the occasion referred to, but if there had been evidence tending in that direction, that there was an entire absence of evidence tending to show that the advances were resisted by the child, or that she was incapable of resisting. The rule as laid down by the learned judge delivering the opinion is to the effect that to constitute an assault and battery with intent to commit a rape, the act must be accompanied with force and against the will of the female, without reference to her age. But we are not willing to adhere to that case.

The statute having made the act of sexual intercourse with a female child under twelve years of age a crime, it must follow as a logical conclusion that the abuse of her person with a view to the accomplishment of that act constitutes an assault and battery with the intent to commit a rape, if sexual intercourse does not take place.

If, under the law, a female under twelve years of age is incapable of giving her consent to the act of sexual intercourse, then she is equally incapable of consenting to all familiarity with her person that necessarily precedes the consummation of the act.

It was not the intention of the Legislature that a female under twelve years of age, because of her tender years, should be protected from an accomplished act of seduction, but left entirely unprotected from all of the defiling acts of the seducer that lead up to her seduction.

Whenever sexual intercourse is attempted with a female under twelve years of age, whether with or without her consent, there exists a felonious intent on the part of the male, and if the attempt miscarries, but in what is done there is a touching of the person of the female, it is an unlawful touching in a rude and insolent manner, and constitutes an assault and battery, and with the felonious intent which is present is an assault and battery with intent to commit a felony.

We can not imagine how it is possible for one person to

Murphy v. The State.

touch the person of another, intending thereby to commit a felony, without the act of touching being rude, insolent, and unlawful.

Section 1834, R. S. 1881, which reads as follows, strongly supports our conclusion : " Upon an indictment or information for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto *or of an attempt to commit the offence.*" The italics are our own.

If the rule as declared in the case of *Stephens v. State, supra*, is to be adhered to, then there can be a rape committed, but no criminal attempt to commit the crime if the child is under twelve years of age and does not resist, and thus an exception to this section of the statute is created, although it recognizes no exception.

We refer to the following authorities cited by counsel for the appellee, and which we have examined, and find that they support the conclusion to which we have arrived : *Hays v. People*, 1 Hill, 351 ; *People v. McDonald*, 9 Mich. 150 ; *People v. Crosswell*, 13 Mich. 427 ; *Stephen v. State*, 11 Ga. 225 ; *State v. Johnston*, 76 N. C. 209 ; *Commonwealth v. Roosnell*, 143 Mass. 32 ; *Givens v. Commonwealth*, 29 Grattan, 830 ; *State v. Cross*, 12 Iowa, 66 ; *State v. Daney*, 83 N. C. 608 ; *People v. Mills*, 17 Cal. 276 ; *Lawrence v. Commonwealth*, 30 Grattan, 845 ; *State v. McCaffrey*, 63 Iowa, 479 ; *State v. Tarr*, 28 Iowa, 397 ; *Cliver v. State*, 45 N. J. L. 46 ; *McComas v. State*, 11 Mo. 116.

We take the following from the case of *Campbell v. People*, 34 Mich. 351 : " The lesser offence of felonious assault is necessarily included in the offence of rape ; the completed offence being the aggravation of the criminal assault."

We come now to the only other question in the record : Was the evidence sufficient to support the conviction ? We are compelled to hold that it was not.

There is an entire failure of proof tending to show that

Works et al. v. The State, ex rel. Holland, Auditor.

the appellant on the occasion in question touched the person of the child Elsie Levitt, or that he did any act from which such touching could be inferred. See *State v. Jaeger*, 66 Mo. 173.

The judgment is reversed, and cause remanded for further proceedings.

The clerk will give the necessary notice for the return of the prisoner to the custody of the sheriff of Sullivan county.

Filed Sept. 24, 1889.

No. 13,487.

120 119
147 211

WORKS ET AL. v. THE STATE, EX REL. HOLLAND, AUDITOR.

MORTGAGE.—Description.—Office of.—The office of a description is not to identify land, but to furnish the means of identification, and where the description contained in a mortgage does this, it is not void.

SAME.—School Fund Mortgage.—Foreclosure.—Party in Interest.—County Auditor.—Right to Testify where Heirs or Administrators are Parties.—In a suit upon the relation of a county auditor to foreclose a school fund mortgage executed during his term of office, the relator is not a party in interest within the meaning of the statute prohibiting parties from testifying as witnesses where heirs or administrators are parties.

From the Switzerland Circuit Court.

W. R. Johnston, for appellants.

J. B. McCrellis, for appellee.

ELLIOTT, C. J.—This suit was brought to foreclose a school fund mortgage. The appellants insist that the court erred in overruling the motion to modify the decree, and in support of their position argue that as to two of the tracts of

Works et al. v. The State, ex rel. Holland, Auditor.

land embraced in the mortgage, the description is so defective as to be void. We can not yield to counsel's argument. The office of a description is not to identify the land, but to furnish the means of identification, and this is done by the description here challenged. *Rucker v. Steelman*, 73 Ind. 396. It furnishes the means of making the description certain, and that which can be made certain is certain.

The controversy here is between the original parties, and directly affects the original instrument, and not subsequent proceedings founded upon it, so that we have no question as to the right to reform a deed or mortgage against a *bona fide* purchaser, nor have we any question as to the right to reform a sheriff's deed.

The relator, who was, at the time the mortgage was prepared, the auditor of the county of Switzerland, was a competent witness. He was not a party in interest within the meaning of the statute prohibiting parties from testifying as witnesses where heirs or administrators are parties. He was a public officer, performing an official duty when the mortgage was executed, and it was as a public officer that he brought the suit as the relator of the State.

Judgment affirmed.

Filed Sept. 25, 1889.

Taylor et al. v. The Board of Commissioners of Jay County.

No. 14,757.

TAYLOR ET AL. v. THE BOARD OF COMMISSIONERS OF JAY COUNTY.

APPEAL.—*Reserved Questions of Law.*—*Final Judgment.*—Section 630, R. S. 1881, authorizing an appeal for the decision of reserved questions of law upon an abbreviated record, does not contemplate an appeal from a ruling before final judgment.

SAME.—*Stay of Proceedings.*—*Interlocutory Order.*—Where, after the filing of an answer, the trial court orders that further proceedings in the cause be stayed until another cause pending in the Supreme Court shall be decided, such order is an interlocutory one, from which an appeal will not lie.

From the Jay Circuit Court.

D. T. Taylor, R. H. Hartford, W. H. Williamson and J. A. Jaqua, for appellants.

T. Bosworth and F. H. Snyder, for appellee.

OLDS, J.—This is an action upon a contract entered into between the appellants and appellees, by which the appellees employed the appellants as the attorneys for Jay county for a period of three years from December 5th, 1887, for a price stated, payable quarterly.

The appellants brought suit for one quarter's salary, and recovered judgment in the court below, and afterwards brought this action upon the judgment rendered, and for two quarters' salary in addition thereto.

An answer in several paragraphs was filed to the complaint in this cause, and at this stage of the proceedings the appellees moved for a stay of the proceedings in this cause until a decision was had in the Supreme Court in the original cause, supporting the motion by the affidavit of one of the board of commissioners setting forth the fact of the prosecution of the former action on the contract to final judgment in the circuit court, and that an appeal had been taken, which was

130	121
128	274
120	121
137	259
139	463
120	121
140	225

Taylor et al. v. The Board of Commissioners of Jay County.

now pending in this court, which involved the validity of the contract sued upon.

The court heard the motion, and ordered "a stay of the proceedings until said cause now pending in the Supreme Court shall be finally decided, unless it should hereafter be made to appear to the satisfaction of the court upon application that a stay until said time ought not to be granted."

The appellants excepted to the order of the court, and notified the court that "they reserved the question, and would take the same to the Supreme Court upon a bill of exceptions only," and filed their bill of exceptions, setting out all the pleadings, motions, and orders of the court in the cause up to that time, and from such order of the court this appeal is prosecuted.

The appellees move to dismiss the appeal, for the reasons that "the order of the court from which the appeal is taken is an interlocutory order, from which no appeal will lie," and that "no final judgment was rendered in the lower court from which an appeal can be taken."

Appellants assume that the appeal is properly taken under section 630, R. S. 1881, and proceed to discuss the alleged error of the court in granting a stay of the proceedings.

Section 630 only points out how questions of law decided by the court during the progress of the cause may be reserved for the decision of the Supreme Court, and does not authorize an appeal for the decision of such questions before final judgment. To hold that this section authorizes an appeal before final judgment would be to grant the right of appeal on every ruling of the court and every interlocutory order made by the trial court during the progress of a cause. The purpose and object of this section is to relieve persons desiring only to present to the Supreme Court some one or more questions decided by the trial court from the burden of procuring a complete record of the whole proceedings in the lower court, and permit such appeal by bill of exceptions

Taylor *et al.* v. The Board of Commissioners of Jay County.

containing such parts of the record as will clearly present the question decided by the trial court.

It is not the policy of the law to permit appeals from interlocutory orders, and such appeals are not permitted unless expressly provided by statute.

The order of the court in this case is clearly an interlocutory order; it only required the doing of something by the plaintiffs, or, rather, that the plaintiffs refrain from doing anything during a particular time during the pendency of the proceedings; it was not determining the controversy, or any portion of it.

The court passed upon no rights of the parties, it simply ordered the postponement of the cause for a certain period of time. It is said by counsel for appellants that it works a hardship on the appellants. Possibly it may; so may a continuance of a cause work a hardship, and this is but a continuance. It may as well be contended that a question might be reserved as to the decision of the lower court granting a continuance, overruling a demurrer to a pleading, or as to any other decision or order of a court made in the progress of the cause, and appealed from before final judgment, as that an appeal will lie from the order in this case.

The statute authorizes an appeal from certain interlocutory orders enumerated in section 646, R. S. 1881, but the order in this case is not such as designated in that section.

In the case of *Western Union Tel. Co. v. Locke*, 107 Ind. 9, an appeal was taken from an order directing the appellant to produce a written instrument, and it was held that an appeal would not lie from such an order. In that case ELLIOTT, J., fully discusses the question, citing numerous authorities in support of the opinion, which fully support the conclusion we have reached in this case.

The appeal is dismissed.

Filed Sept. 25, 1889.

The State v. Leach.

No. 14,934.

THE STATE v. LEACH.

CRIMINAL LAW.—Jury.—Discharge without Agreement.—Reasonable Time for Deliberation.—Discretion of Court.—The length of time that a jury shall be kept together in a criminal case without a verdict is a matter very much within the discretion of the court; and where, considering the nature of the offence and the punishment prescribed, they have been out a reasonable time without agreement, they may be discharged without working an acquittal of the defendant.

SAME.—Justice of Peace.—Disagreeing Jury.—Discharge.—Jeopardy.—In a prosecution before a justice of the peace for being found drunk in a public place, the discharge of the jury by the justice after they have spent three hours in deliberating upon their verdict without agreement, is not an abuse of discretion and does not work the acquittal of the defendant on the ground that he has been once in jeopardy.

From the Sullivan Circuit Court.

L. T. Michener, Attorney General, *W. C. Hultz*, Prosecuting Attorney, *J. H. Gillett* and *O. B. Harris*, for the State.

W. S. Maple, *J. T. Beasley* and *A. B. Williams*, for appellee.

BERKSHIRE, J.—The appellee was tried before a justice of the peace, and convicted of the offence of being found in a public place in a state of intoxication. See section 2091, R. S. 1881. From the judgment of the justice he appealed, and in the circuit court filed an answer alleging the following facts:

That on the 29th day of June, 1888 (the affidavit having been filed theretofore), he was tried before the said justice upon said charge, and the jury, having been out three hours and failing to agree, were, by said justice, discharged, without the appellee's knowledge or consent, and in his absence; that afterwards, and on the 2d day of July, 1888, the appellee was again lawfully tried, before said justice and a jury, upon said charge; that after all the evidence had been in-

The State v. Leach.

roduced, and at about the hour of 3 P. M., by agreement and without argument of counsel, the case was given to the jury, and they retired to deliberate of their verdict ; that about 6 o'clock, P. M., and when they had been out not to exceed three hours, said jury, not having agreed upon a verdict, without the consent of the appellee, and in his absence from the court-room, said justice discharged said jury ; that the room to which said jury retired, and where they were holding their deliberations, was, during the time they were so using it, and when they were discharged, comfortable and convenient, and there existed no physical reason for their discharge ; that at the time of the discharge of said jury, on said 2d day of July, costs had accumulated in said case to the amount of fifty dollars.

To this answer the attorney representing the State addressed a demurrer, which the court overruled, and the proper exception was taken. The State refusing to plead further, the court discharged the appellee without a trial.

Neither the Constitution of the United States nor of this State will allow a citizen put in jeopardy twice for the same offence, but if after a jury is empanelled and a trial had a reasonable excuse arises for a discharge of the jury, this will not work an acquittal of the accused. *United States v. Perez*, 9 Wheaton, 579.

The length of time that a jury should be kept together in a criminal case without a verdict is a matter very much within the discretion of the court.

In the case of *State v. Walker*, 26 Ind. 346, the learned judge delivering the opinion said : " But after a careful examination of the question, we are clearly of the opinion that the discharge of the jury because of their inability to agree, * * after it is apparent to the court that they can not agree upon a verdict, constitutes a good cause for their discharge, and leaves the accused subject to be tried by another jury."

In the case of *Fowler v. State*, 85 Ind. 538, it is said : " The decisions which declare the rule governing in cases of trials

The State v. Leach.

in courts of superior jurisdiction in cases of felony, can not be applied in their rigorous strictness to trials before justices of the peace upon a charge of misdemeanor where no severe penalty can be inflicted, and where an appeal lies which secures a trial *de novo*. It is obvious that the phrase, 'a reasonable time,' is a relative one, and is to be considered as having relation to the forum, the character of the charge, and the extent of the penalty. It would be unreasonable to require a jury to be kept a great length of time in a justice's court where the charge is not one of very great gravity, and the punishment can not extend beyond a fine of a few dollars." See *Shaffer v. State*, 27 Ind. 131.

It is too well settled to require the citation of authorities that it is only in cases where there has been an abuse of discretionary power that a court of last resort will interfere. Until the contrary appears, the presumption is always in favor of the action of the lower courts in the exercise of their discretionary power. The justice's record states that after the jury had been out *a reasonable time*, and the court being satisfied that there was no reasonable probability that they would agree upon a verdict, they were discharged.

In the case of *Fowler v. State*, *supra*, the minimum fine was \$20; in the case under consideration the maximum fine was five dollars. In that case the jury were kept out three hours, the same length of time as in this case, and it was held that the discharge of the jury did not work a discharge of the accused.

It would seem, in view of the diminutive character of the offence, that three hours' time spent by twelve men competent to serve as jurors, independent of all extrinsic circumstances, and a failure to agree upon a verdict, would be "a reasonable length of time," and that the justice might with safety discharge the jury. But, as we have seen, his record shows that having become satisfied that there was no reasonable probability that the jury would agree upon a verdict he discharged them.

 Skinner v. The State.

In the exercise of his discretionary power, it became a question for him to consider and determine as to whether there was any probability that the jury would agree upon a verdict, and having determined that there was no probability of an agreement, it was his privilege to discharge them, and make a record of his action.

Now, does the answer allege facts sufficient to overthrow the record made by the justice, and justify the conclusion that there was an abuse of discretion in discharging the jury? We think not.

All that is alleged in the answer may be true, and the action of the justice in discharging the jury eminently proper. It is not alleged, nor is it claimed, that the jury would have made a verdict if kept longer; for all that appears, the facts as presented to the justice may have been of such a character as to convince him that the jury would not have agreed if kept on bread and water for a month.

The judgment is reversed, with costs, and the court below instructed to sustain the demurrer to the answer.

Filed Sept. 25, 1889.

No. 15,043.

SKINNER v. THE STATE.

CRIMINAL LAW.—*Disorderly Liquor Shop.*—*Indictment.*—*Language of Statute.*

—As section 2097, R. S. 1881, creates and fully defines the offence of keeping a disorderly liquor shop, "to the annoyance or injury of any part of the citizens of this State," an indictment thereunder which follows the language of the statute in charging the offence is sufficient.

SAME.—"Citizens" of this State.—*Meaning of Term.*—*Proof.*—*Inference.*—In a

130	197
130	555
133	36
130	137
135	414

120	127
1170	126

 Skinner v. The State.

prosecution under such section, proof that the shop in question was located on a public street in a town in this State, and that the persons who were annoyed thereby resided in the town, near the shop, justifies the jury in inferring that such persons were citizens of the State, without direct proof to that effect, as the word "citizen," as used in said statute, means an inhabitant in any city, town, or place.

SAME.—*Witness.*—*Interest.*—*Procuring Testimony.*—*Impeachment.*—*Collateral Matter.*—Where, in a prosecution for keeping a disorderly liquor shop, a witness for the State on cross-examination denies having said to another person "All the rest of us are going to say that he (the defendant) was drunk all the time; that we never saw him sober, and you just get up there and say the same thing," evidence to contradict such witness is competent, as such matter is not a collateral one.

From the Grant Circuit Court.

A. Steele and *J. A. Kersey*, for appellant.

L. T. Michener, Attorney General, *S. W. Cantwell*, Prosecuting Attorney, and *H. J. Paulus*, for the State.

COFFEY, J.—This was a prosecution by the State against the appellant under section 2097, R. S. 1881, for keeping a disorderly liquor shop.

That section provides that "Whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner, to the annoyance or injury of any part of the citizens of this State, shall be fined, for every day the same is so kept, not more than one hundred dollars nor less than ten dollars."

The indictment charges that the appellant, Allen Skinner, on the 1st day of June, A. D. 1888, and continuously thereafter to the day of making this indictment, at the county and State aforesaid, did then and there unlawfully keep a place, to wit, a saloon where intoxicating liquors were sold, bartered and given away, and suffered to be drunk in a disorderly manner, and did then and there keep said saloon in a disorderly manner, by then and there unlawfully permitting and suffering divers persons, on week days and Sundays, by day and by night, to congregate in and about said saloon, and then and there make a great noise by yelling, quarreling, boister-

Skinner v. The State.

ous talking, fighting, swearing, and drunken rows, to the annoyance and injury of part of the citizens of said State, etc. The indictment was filed on the 8th day of September, 1888.

Upon a plea of not guilty, the cause was submitted to a jury, who returned a verdict of guilty, assessing a fine against the appellant.

Over a motion for a new trial and a motion in arrest of judgment, the court rendered judgment on the verdict.

The errors assigned are :

1st. That the facts stated in the indictment do not constitute a public offence.

2d. That the court erred in overruling the motion in arrest of judgment.

3d. That the court erred in overruling the motion of appellant for a new trial.

Under the first and second assignments of error, it is contended by the appellant that the indictment above set out is defective, in failing to aver that the saloon therein named was kept in any public place, or near any public highway, in any city, town or village, or that any person resided in the vicinity, or were in the habit of passing near it, and in support of his contention cites the case of *Mains v. State*, 42 Ind. 327.

On the other hand, it is contended by the appellee that there is a distinction between the case at bar and the case of *Mains v. State*, *supra*, in this, that the acts named in the statute under consideration constitute the offence charged, and that hence it is sufficient to follow the language of the statute, while in the case of *Mains v. State*, *supra*, the offence sought to be charged was that of maintaining a public nuisance, an offence known to the common law, and hence it was necessary to aver facts which would have constituted a nuisance under the common law definition of that crime.

The general rule is, that an indictment describing the offence in the language used by the statute in defining it is

Skinner v. The State.

sufficient. *State v. Bougher*, 3 Blackf. 307; *Pelts v. State*, 3 Blackf. 28; *Marble v. State*, 13 Ind. 362; *Malone v. State*, 14 Ind. 219; *Stuckmyer v. State*, 29 Ind. 20; *Shinn v. State*, 68 Ind. 423; *State v. Allisbach*, 69 Ind. 50; *Howard v. State*, 87 Ind. 68; *Toops v. State*, 92 Ind. 13; *State v. Miller*, 98 Ind. 70; *State v. Berdetta*, 73 Ind. 185.

Some of the exceptions are where the statute creating the offence charged contains language which embraces acts evidently not intended to be made criminal, and cases where it was the evident intention of the Legislature that reference should be had to the common law for a complete definition of the offence declared by the statute. *Schmidt v. State*, 78 Ind. 41; Moore Crim. Law, section 171; *Anderson v. State*, 7 Ohio, 607; *Mains v. State*, *supra*.

The case of *Mains v. State*, *supra*, falls within the latter exception.

The statute under consideration does, in our opinion, create and fully define the offence for which the appellant was prosecuted. It declares that whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner, to the annoyance or injury of any part of the citizens of this State, shall be fined, etc. In such case we think it sufficient, in charging the violation of such statute, to follow the language of the Legislature in defining the offence. We think the indictment above set out charges a public offence, and that the court did not err in overruling the motion in arrest of judgment.

The appellant assigned in the court below nineteen reasons for a new trial, but we shall consider those only which he has seen fit to discuss in his able brief in the cause.

It is earnestly insisted that the evidence in the cause does not tend to support the verdict of the jury, and it is urged in support of this contention that there is no evidence that any of the persons claiming to have been disturbed by the dis-

Skinner v. The State.

orderly manner in which the saloon named in the indictment was kept were citizens of the State of Indiana.

It appears from the evidence in the cause that the saloon in question is located on a public street in the town of Marion, in Grant county, Indiana.

Many of those claiming to have been disturbed by the disorderly manner in which the saloon was kept testified that they resided in said town and near the saloon, but none of them testified in direct terms that they were citizens of the State. The question is, was this evidence sufficient to authorize the jury to infer that these persons were citizens?

Webster defines *citizen*: 1. "One who enjoys the freedom and privileges of a city, as distinguished from a foreigner, or one not entitled to its franchises." 2. "An inhabitant in any city, town, or place."

It was evidently the intention of the Legislature to protect those residing in the State from the annoyances incident to the keeping of a disorderly saloon, and to compel those engaged in the business of retailing intoxicating liquors to keep their places of business in an orderly manner. Having that object in view, it is reasonable to suppose that when it used the word "citizen" it used it with reference to the second definition of that word as given by Mr. Webster.

We think the jury, under all the evidence in the cause, might well have inferred that those claiming that they had been disturbed by the manner in which appellant kept his saloon were citizens of the State. We think the evidence tends to support the verdict of the jury.

During the progress of the trial various items of evidence were admitted over the objection of the appellant, but after a careful examination of such evidence we do not think it subject to the objections urged against it. It had some bearing upon the main question under consideration, tending to show the manner in which the appellant conducted his business, and the means of knowledge possessed by some of the

Skinner v. The State.

witnesses produced by the appellant, and was, in our opinion, for these reasons admissible.

On the trial of the cause, the appellant, for the purpose of impeaching one of the witnesses for the State, put to her this question :

" You may state to the jury, Mrs. Colors, if you did not, to-day, in this building, in the presence and hearing of Laura Redman, say to Della Middleton these words: 'All the rest of us are going to say that he was drunk all the time; that we never saw him sober, and you just get up there and say the same thing,' speaking of Skinner."

To which, witness answered: " Yes, sir; I was speaking, and all said that he was drunk, and that ain't no lie."

Question. "And for her to say the same thing?"

Answer. "I didn't tell her what to say; I have nothing to say about what she has to say, nor didn't tell her anything she should say."

The appellant then called Laura Redman, and put to her this question :

" You may state whether or not, to-day, in this building, Mrs. Colors, speaking of Allen Skinner to Della Middleton in your presence and hearing, said these words: 'All the rest of us are going to say that he was drunk all the time; that we never saw him sober, and you just get up there and say the same thing.' "

To this question the State objected, and the court sustained the objection.

The appellant then offered to prove by Laura Redman that on that day, in the building they then occupied, Mrs. Colors, a witness for the State, said of the appellant, to Della Middleton, in the presence and hearing of the witness, Laura Redman, the words: "All the rest of us are going to swear that he was drunk all the time; that we never saw him sober, and you just get up there and say the same thing." But the court refused to permit this evidence to go to the jury, and the appellant excepted.

Skinner v. The State.

Mrs. Colors was one of the witnesses for the State, and had testified that she had been annoyed by the disorderly manner in which appellant had kept the saloon then under investigation.

In the case of *People v. Hall*, 4 Am. Cr. Rep. 357, it was held to be competent for the defendant to show that a witness for the prosecution had been procuring witnesses against the defendant, as it might tend to weaken his testimony in the minds of the jury; indeed, it is no uncommon thing to show that a witness has taken an active part on the side for which he testifies with a view of weakening the testimony of such witness.

We suppose the learned judge, who excluded this offered evidence, had in mind the well known rule that a witness can not be impeached in a matter collateral to the issue on trial, but it now seems to be well settled that the feeling of a witness who testifies in a cause is not a collateral matter. The case of *Powell v. Martin*, 10 Iowa, 568, is directly in point. In that case the witness was asked a question which, if answered in the affirmative, would have shown that he had been taking an active part in trying to procure testimony for the party on whose behalf he had testified, but he answered the questions in the negative. It was held that the party against whom he gave his testimony was entitled to impeach him by proving by other witnesses that he had been active in attempting to procure testimony in the cause, and in support of the ruling the court cites 1 Greenl. Ev., section 450, *Atwood v. Welton*, 7 Conn. 66, Swift Ev. 148, *Turner v. Austin*, 16 Mass. 181, 185, and *Tucker v. Welsh*, 17 Mass. 160.

The general rule undoubtedly is, that where a witness is cross-examined on matters collateral to the issues, his answer can not be contradicted by the party putting the question. This rule, however, has no application where it is sought to show that the witness has an interest in the case, or that he is hostile to one of the parties to the suit, and if such witness, on cross-examination, denies such interest or

Wright v. Ball *et al.*

such hostility, he may be contradicted by his own acts or statements. *Scott v. State*, 64 Ind. 400; *Johnson v. Wiley*, 74 Ind. 233; *Stone v. State, ex rel.*, 97 Ind. 345.

In our opinion, the court erred in excluding the evidence offered by the appellant as above set out, for which error this cause must be reversed.

Judgment reversed, with instructions to the court below to grant the appellant a new trial, and for further proceedings not inconsistent with this opinion.

Filed Sept. 25, 1889.

No. 13,679.

WRIGHT v. BALL ET AL.

PRACTICE.—Pleading.—Exception.—An exception is necessary to present any question upon a ruling sustaining a demurrer to a pleading.

From the Clinton Circuit Court.

J. C. Suit and ——— *Combs*, for appellant.

F. F. Moore, for appellees.

MITCHELL, J.—Suit by Ball and others against Wright on a note, payable in a bank in this State, signed by the defendant as maker, and endorsed by the payee to the plaintiffs before maturity. The defendant complains of the ruling of the court in sustaining a demurrer to his cross-complaint, in which he set up facts upon which he asked that the note sued on be cancelled.

There was no exception to the ruling of the court of which complaint is now made. There is, therefore, no question in the record.

The judgment is affirmed, with costs.

Filed Sept. 28, 1889.

Barnard *et al.* v. Graham *et al.*

No. 13,862.

BARNARD ET AL. v. GRAHAM ET AL.

INTOXICATING LIQUOR.—License.—Notice of Application.—Place of Sale.—Insufficient Description.—Where there is no street named Main street in a town, and where the only lots therein numbered twenty-three are lots twenty-three east and twenty-three west, both situate upon Michigan street, a notice of an intention to apply for license to retail intoxicating liquors which describes the location of the proposed place of sale as being upon lot twenty-three on Main street, does not comply with the statute (section 5314, R. S. 1881), and is bad when attacked by a remonstrance.

From the Clinton Circuit Court.

L. D. Boyd and J. Claybaugh, for appellants.

J. Applegate and C. R. Pollard, for appellees.

ELLIOTT, C. J.—The appellees applied for a license to sell intoxicating liquors, and in their petition and in the notice given by them, the place where they proposed to sell was thus described: "Said premises are located in a certain frame building on the ground floor of said building, situated upon the following real estate in Carroll county, Indiana, to wit: Commencing at a point at the southwest corner of lot No. 23, on Main street, and running east fifty feet, thence north twenty feet, thence west fifty feet, thence south twenty feet to the place of beginning, in the town of Burlington, Burlington township, in Carroll county, Indiana." The appellants appeared in the commissioners' court of Carroll county, and there filed a remonstrance, but the decision of that tribunal was adverse to them, and they appealed. After the case reached the Carroll Circuit Court, it was carried, by change of venue, to the Clinton Circuit Court. In the commissioners' court a motion was filed to dismiss the application, on the ground that the notice was insufficient. The appellants, in the remonstrance filed by them, again challenged the sufficiency of the description of the premises con-

Barnard et al. v. Graham et al.

tained in the notice and application of the appellees. They stated in their remonstrance that "There are two lots numbered twenty-three in the town of Burlington, the description of one being lot No. 23 west, in the town of Burlington, the other being described as lot No. 23 east, in the town of Burlington, each of them being located on Michigan street in said town." It is further shown "that the said lots do not abut on any other street except said Michigan street; that there is no lot in said town numbered twenty-three except the above described lots, and that there is no street in the town of Burlington that is named Main street; that the description set out in the notice does not locate or describe any property or any ground in the town of Burlington." The plats of the town and the other evidence very clearly show that there are two lots in Burlington numbered twenty-three, but that one is number twenty-three east and the other number twenty-three west. The evidence also shows that there is no street of the town named Main street, and that lot twenty-three east and lot twenty-three west both abut on Michigan street. There is, however, some evidence tending to show that Michigan street is the principal street of the town, and that it is sometimes called Main street.

It is important to observe that the sufficiency of the notice was directly and seasonably attacked, so that here the question is before us in a direct proceeding. Cases which declare the rule in cases of a collateral attack are, therefore, without influence.

Our statute enacts that it shall be unlawful to sell liquor in less quantities than a quart "without first procuring a license as hereinafter provided." R. S. 1881, section 5312. The effect of this provision is to require the applicant to do what the statute commands, for, unless he does this, he has no right to demand or receive a license. There is, as against a direct remonstrance, no authority vested in a board of commissioners to grant a license to one who has not complied with the provisions of the law concerning notice.

Barnard et al. v. Graham et al.

The statute imposes upon an applicant the duty of publishing a notice of his intention to apply for a license, and commands that the notice shall state "the precise location of the premises in which he desires to sell." R. S. 1881, section 5314.

The language of the statute is unusually strong. It is not only declared that the notice shall state the location, but it is declared that it shall state the "precise location." The word "precise" is one of clear and well defined meaning, and can not be disregarded. The Legislature had, as is evident from the language employed, a settled purpose, and that was to provide for a notice that should inform the citizens of the exact locality of the place where the applicant proposes to conduct his business. But the language is so strong and unambiguous that it is unnecessary to look beyond the words of the statute.

We can conceive of no legal reason upon which it can be held that the notice or the application states the "precise location." As there is no such lot as the one named there is, in fact, no locality at all designated. The confusion is increased by the fact that there are two lots abutting on Michigan street numbered twenty-three, for, without adding to the number the word "east," or the word "west," it is impossible to determine what lot was intended.

We have no doubt that it is the right of citizens of the proper locality to object to the granting of a license to one who has not done what the law declares he must do.

We do not deem it necessary to consider the question of the right of the appellees to amend their petition or application in the circuit court, for, whatever may be the law upon that question, it is quite clear to us that a notice so essentially defective as the one given by them will not, when attacked as it is here attacked, authorize the grant of a license.

Judgment reversed, with instructions to proceed in accordance with this opinion.

Filed Sept. 27, 1889.

Andis v. Richie.

No. 13,540.

120	138
135	448

ANDIS v. RICHIE.

NEW TRIAL.—*Newly Discovered Evidence.*—*Change of Result.*—There is no available error in refusing a new trial on the ground of newly discovered evidence where the new evidence is not of such a character as would probably change the result on another trial.

SAME.—*Amendment of Application.*—*Materiality of Evidence.*—While it seems that an application for a new trial may be amended at a subsequent term by inserting additional affidavits, a refusal to allow the amendment is only available where the new evidence is material.

From the Hancock Circuit Court.

J. A. New, A. M. New, J. W. Jones and R. Williamson,
for appellant.

C. G. Offutt, for appellee.

MITCHELL, J.—There was judgment in the court below against Andis, in an action of replevin brought by him against Richie, to recover the possession of a horse which the former charged that the latter unlawfully detained from him. The only question presented on this appeal involves the correctness of the ruling of the court in overruling a motion for a new trial, which was asked on the ground of newly discovered evidence.

The parties were at variance in their testimony, the plaintiff asserting that he had loaned the horse to Richie, while the latter testified that he had purchased the animal from Andis, and had agreed to pay a stipulated price, in clearing land for the plaintiff; that he had entered upon the work, and was ready to complete it within the time agreed upon. After the trial the plaintiff produced an affidavit in which the affiant deposed, that some time prior to the first trial he inquired of the defendant whether he had purchased the horse in controversy, to which the latter responded in the

Andis v. Richie.

negative, adding that he was only breaking him for the plaintiff.

It also appears in the bill of exceptions that a witness, called by the plaintiff, testified at the trial that the defendant told him that he was breaking the horse for Andis.

Before this court would feel warranted in reversing a judgment for refusing a new trial on the ground of newly discovered evidence, it must be made to appear that the newly discovered evidence is of such a character as to render it probable that a different result would be produced if a second trial were had. This does not seem at all probable in the present case. The newly discovered evidence is not so essentially different from other evidence given at the trial as to make it of a controlling character. It is of the same kind and to the same point as other evidence already in the record, and assuming that the application shows that due diligence was used, the evidence proposed is in its nature merely cumulative, and is not of sufficient materiality to justify a reversal of the judgment.

After the motion for a new trial had been made, and after it had been pending over one term of court, the plaintiff asked leave to amend the application by inserting the affidavits of other witnesses, in which were set forth other facts which they would testify to. Leave to amend was refused. We are inclined to the opinion, that if pending a motion for a new trial it should be made to appear that the moving party had discovered other material evidence, not embraced in his original motion, and that he had not been lacking in diligence, it would be an abuse of discretion to refuse permission to amend. But the other newly discovered evidence in the present case was probably deemed immaterial. The court might well have so considered it. There was no error.

Judgment affirmed, with costs.

Filed June 28, 1889; petition for a rehearing overruled Sept. 27, 1889.

120	140
165	390

No. 13,801.

**THE LOUISVILLE, NEW ALBANY AND CHICAGO RAIL-
WAY COMPANY v. KANE ET AL.**

BILL OF EXCEPTIONS.—*Must be Signed by Judge.*—A bill of exceptions which is not signed or attested by the judge is without force.

SPECIAL VERDICT.—*Must be Requested.*—Where a party submits to the court the form of a special verdict and asks that it be placed before the jury, but does not request that a special verdict be returned, the court does not err in refusing to submit the paper to the jury.

NEW TRIAL.—*Inconsistency between Verdict and Interrogatories.*—Inconsistency between the general verdict and the answers to interrogatories is not a cause for a new trial.

VERDICT.—*Support of Evidence.*—*Answers to Interrogatories.*—Answers of the jury to interrogatories can not be used to determine whether the verdict is supported by the evidence, where the evidence is not in the record.

INTERROGATORIES TO JURY.—*Definite Answer.*—*Refusal to Require.*—It is not error to refuse to require the jury to give a more definite answer to an interrogatory, where the answers to other interrogatories cover the subject.

From the Madison Circuit Court.

G. W. Friedley and G. R. Eldridge, for appellant.

C. L. Henry, H. C. Ryan and H. D. Thompson, for appellees.

ELLIOTT, C. J.—This action was brought by the appellees to recover for services rendered the appellant as attorneys. There is no bill of exceptions containing the evidence, and many of the questions discussed by appellant's counsel are not presented by the record. There is in the record a paper purporting to be the stenographer's report of the evidence, but it is not signed or attested by the judge, and is, therefore, entirely without force. The judge recites, in a separate paper, that special bills of exceptions and a general one were presented to him, and that he signs them, but the general bill is not signed. There was not, it is ob-

The Louisville, New Albany and Chicago Railway Co. v. Kane *et al.*

vious, a compliance with the law. *Wagoner v. Wilson*, 108 Ind. 210; *Stone v. Brown*, 116 Ind. 78; *Colt v. McConnell*, 116 Ind. 249.

The appellant submitted to the court the form of a special verdict, and asked that it be placed before the jury, but did not request that a special verdict be returned. The court did not err in refusing to submit the paper prepared by the appellant to the jury. If the appellant had demanded a special verdict a very different question would be presented.

Inconsistency between the general verdict and the answers to interrogatories is not a cause for a new trial, nor can the answers be used to determine whether the verdict is supported by the evidence in a case where the evidence is not in the record. *North-Western, etc., Ins. Co. v. Blankenship*, 94 Ind. 535, 548; *Stockton v. Stockton*, 40 Ind. 225, 228; *Tucker v. Conrad*, 103 Ind. 349; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 88, 96.

No harm was done the appellant by refusing to require the jury to give a more definite answer to the twenty-sixth interrogatory propounded by the appellant. Answers to other interrogatories very fully covered the matters referred to in the twenty-sixth interrogatory. If the court erred at all, and we are inclined to think it did err, it was in allowing that interrogatory to go to the jury. It is not the object of the statute to permit many interrogatories to go to the jury, and certainly not to permit the repetition of questions. The statute was designed to elicit material facts, not mere items of evidence. It was not intended that interrogatories should be employed to harass or confuse jurors; but the purpose of the statute is to elicit the facts, so that the court may pronounce judgment upon them.

There is no material inconsistency between the answers to the interrogatories and the general verdict.

Judgment affirmed.

Filed Sept. 17, 1889.

Sunman v. Clark.

No. 13,725.

SUNMAN v. CLARK.

MEASURE OF DAMAGES.—*Breach of Contract to Saw Lumber.*—Where one agrees to saw timber belonging to another into lumber of certain dimensions and for a certain purpose, but saws it in such a manner as to make it unfit for the purpose intended, the measure of damages is the difference between the market value of the lumber as it is sawed and its market value if sawed according to the contract.

SAME.—*Theory of Action.*—*Skill.*—*Negligence.*—*Instruction.*—If, in such case, the owner of the lumber predicates his right to recover damages upon the unskilful and negligent manner in which it was sawed, and upon this theory issue is joined and evidence heard, he can not object to an applicable instruction, on the ground that under the contract a failure to saw the lumber as agreed gave a right of action for damages without regard to the question of skill.

SAME.—*Harmless Instruction.*—Where the jury determine that a party is not entitled to recover any damages, no available error can be predicated upon an instruction which assumes to state the rule for the measurement of damages.

From the Ripley Circuit Court.

J. B. Rebuck, C. H. Willson, J. S. Duncan, C. W. Smith and J. R. Wilson, for appellant.

E. P. Ferris, W. W. Spencer, J. S. Ferris, J. H. Connelley and J. L. Benham, for appellee.

COFFEY, J.—The complaint in this cause avers that on and from the first day of October, 1884, to the 30th day of May, 1885, the plaintiff, at the special instance and request of the defendant, cut timber, hauled logs and lumber, sawed logs into lumber, planed lumber, and loaded cars for the defendant, a bill of particulars of which is filed with the complaint and made part thereof; that said labor and services were worth \$1,200, which is due and unpaid.

A demurrer to this complaint was overruled, and the appellant excepted. The appellant then filed his answer, in three paragraphs. The first is a general denial; the second

Sunman v. Clark.

is a plea of payment, and the third avers that the plaintiff and defendant entered into a contract whereby the plaintiff agreed to cut into logs, haul said logs to his mill and saw into good merchantable lumber, such trees belonging to the defendant as might be designated and pointed out to the plaintiff by the defendant, for the sum of \$6.75 per thousand feet; that all of said lumber was to be sawed, as to width and thickness, as indicated by the defendant; that said plaintiff entered upon the execution of said contract, and was directed by the defendant to saw twenty-five thousand feet of said logs into lumber four inches thick and four inches wide, five inches thick and five inches wide, six inches thick and six inches wide, and seven inches thick and seven inches wide, to be used as pump stocks; that plaintiff undertook to saw said logs into pump stocks four inches wide and four inches thick, and sawed 21,451 feet of the same; that by the carelessness and negligence of the plaintiff and the men in his employ, operating and running said mill, and the unskilful manner in which the same was sawed, 10,899 feet of said 21,451 feet of lumber was not sawed four inches wide and four inches thick, or five inches wide and five inches thick, or six inches wide and six inches thick, or seven inches wide and seven inches thick, but was sawed in such an unskilful manner that it could not be used for pump stocks; that said defendant had contracted and sold all of said lumber that would pass for pump stocks at twenty-five dollars per thousand feet, and that by reason of the carelessness and negligence of the plaintiff, and the men operating and working the plaintiff's mill, and the unskilful manner in which said lumber was sawed, said 10,899 feet was sawed in such a manner that it was worthless for pump stocks, and that by reason of the carelessness and negligence of said plaintiff and the persons in his employ, and the unskilful manner in which said lumber was sawed, this defendant was compelled to, and did, sell said 10,899 feet of said lumber for \$12.50 per thousand feet, which sum was a fair cash price for said lumber; and that

Sonman v. Clark.

by reason of the carelessness and negligence of said plaintiff and the men in his employ working and operating said mill, the defendant was damaged in the sum of one hundred and fifty dollars by reason of the unskilful manner in which said 10,899 feet of lumber was sawed.

The appellee replied, by way of general denial. The cause was tried by a jury, who returned a verdict for the appellee. Over a motion for a new trial the court rendered judgment on the verdict. The appellant assigns as error, in this court:

First. That the complaint does not state facts sufficient to constitute a cause of action.

Second. That the court erred in overruling the demurrer to the complaint.

Third. That the court erred in overruling the appellant's motion for a new trial.

No question is made in the brief of counsel as to the sufficiency of the complaint, and for that reason the first and second assignments of error are to be regarded as waived.

The appellant assigns as reasons for a new trial that the court erred in its instructions to the jury. The fourth instruction given by the court, on its own motion, was as follows:

"4th. If the defendant had a contract with the plaintiff, such as he has asserted in the third paragraph of his answer, and if the plaintiff sawed the 10,899 feet, or any other number of feet, of lumber for pump stocks so unskilfully or negligently that it was not marketable for pump stocks, because of not being sawed according to contract, and in consequence thereof the defendant was damaged, then you should allow him for such damage; and the measure of damages in such case would be the difference between the market value of the lumber as it was sawed and its market value if it had been sawed as agreed upon, or as it ought to have been."

It is claimed by the appellant that this instruction is erroneous, as the contract itself furnished the rule of damages.

Sunman v. Clark.

The instruction, we think, states the general rule of law applicable to cases like this correctly, and is not erroneous. At least the appellant could not have been injured thereby, as the record discloses the fact that the jury refused to allow him any damages on account of the matters set up in the third paragraph of his answer. If the jury found that he was not entitled to recover *any* damages on that paragraph of his answer, it became wholly immaterial as to what the rule might be under which damages should be measured.

The tenth instruction given by the court was as follows:

"10th. Whether, if any of the sawing was done defectively, or of under-width for pump stocks, the same could not have been avoided, with proper care, you must determine from the evidence. If it could not be avoided, with proper care, then it could not be said to have been done unskilfully; but if, with proper care, said under-width could have been avoided, then to saw the same in under-width would be unskilful sawing. How this was, is a question of fact, to be determined by you from the evidence."

It is urged that this instruction is erroneous, for the reason that if the appellee agreed to saw the lumber in a particular manner, a failure to do so would render him liable to the damages occasioned thereby, without regard to the question of skill. We do not think this instruction is subject to the objection urged against it.

As will be seen, the appellant, in his answer, predicates his right to recover damages upon the unskilful, careless, and negligent manner in which the lumber was sawed. The instruction was directed to a question involved in the case as made by the issues and evidence in the cause, and directed the attention of the jury, properly, to a question of fact before them for their consideration.

It is also claimed by the appellant that in the sixth instruction given by the court, the court assumed the existence of a fact about which there was a conflict in the evidence, and

Sunman v. Clark.

that it is, therefore, erroneous ; but we do not so understand the instruction. It is true that appellee testified that he was to be paid for sawing lumber by what was known as face measure, while the appellant testified that he was to pay the appellee for the lumber sawed by him according to the reports from those to whom he sold ; but we do not understand the appellant as denying that the lumber was to be measured according to the face measure, whether measured by the immediate parties to the contract or by those to whom it should be sold.

Had the appellee recovered for all the items proven on the trial, his verdict would have been much larger than that recovered. No witness attempted to give the condition of the accounts between the parties, except the appellee. He testified that after the labor was all performed he and the appellant had a settlement, in which it was ascertained that the appellant owed him \$441.43, and that he agreed and promised on several occasions to pay it. The appellant did not deny this statement, and the jury returned their verdict for that sum. The verdict and judgment are right under the evidence, and we find no error in the record.

Judgment affirmed.

BERKSHIRE, J., took no part in the decision of this cause.

Filed Sept. 27, 1889.

Patton *et al.* v. Creswell *et al.*

No. 13,722.

PATTON ET AL. v. CRESWELL ET AL.

HIGHWAY.—*Change of Location.*—*Vacation.*—*Consolidation.*—*Petitioners Required.*—A proceeding for the change of a highway is properly brought, under section 5046, R. S. 1881, merely upon the petition of the persons through whose lands it runs, even though the change involves the vacation of the highway and its consolidation with another running upon a different line, but also upon the petitioners' lands, which latter highway it is asked may be widened.

From the Decatur Circuit Court.

J. K. Ewing and *C. Ewing*, for appellants.

J. D. Miller and *F. E. Gavin*, for appellees.

MITCHELL, J.—Patton and two others presented their petition to the board of commissioners of Decatur county, in which they represented that they were the owners of certain described real estate, over and upon which there was located and established a certain highway running in a southeasterly direction, the location of which they were desirous of changing, so that it should run in an easterly direction along a section line, in a manner described in the petition. It appeared that there was an existing highway about twenty feet in width, which had been established by continuous use, over the petitioners' lands, over and along the line upon and to which the highway first described was proposed to be changed, which existing highway it was proposed to alter so as to make it thirty-five feet wide. It was represented that the public would not be materially injured by the proposed change. Viewers were duly appointed, who reported that in their opinion the proposed change would not result in material injury to the public, their report being otherwise in conformity with the statute.

There was a remonstrance presented to the board, in which

Patton *et al.* v. Creswell *et al.*

various grounds of objection were stated, and the remonstrants also moved that the petition and proceedings be dismissed, alleging for cause that the board of commissioners had no jurisdiction, because the petition was only signed by three, instead of twelve, freeholders. It is sufficient to say the board of commissioners refused to dismiss the proceedings, and, upon hearing the evidence, ordered the change to be made as prayed for in the petition. In the circuit court, to which the proceedings were taken by appeal, the remonstrants renewed their motion to dismiss the petition, while the petitioners moved to dismiss the appeal. The latter motion was overruled, the former was sustained, and the proceedings dismissed. The propriety of these several rulings is now presented on this appeal.

The proceedings were instituted under section 5046, R. S. 1881, which provides; in substance, that any person or persons through whose lands any public highway may run, may petition the board of commissioners of the proper county to change the location of the highway on their own land, or on the lands of any other person consenting thereto.

It appears that due notice of the filing of the petition had been given, besides, filing a remonstrance waived the giving of notice so far as the remonstrants were concerned. *Heagy v. Black*, 90 Ind. 534; *Green v. Elliott*, 86 Ind. 53; *Adams v. Harrington*, 114 Ind. 66; *Gilbert v. Hall*, 115 Ind. 549. There was, therefore, no defect in the jurisdiction over the persons of the remonstrants.

It is contended, however, that it appears upon the face of the petition that the purpose of the petitioners was not to procure a highway running over their land to be changed, within the meaning of sections 5046, 5047, 5048 and 5049, but to have an existing highway entirely vacated, and another highway then existing widened from twenty to thirty-five feet. Hence, it is said, in order to its validity, the proceeding must have been commenced under section 5015, R. S. 1881, which requires that a petition to locate, vacate, or

Patton et al. v. Creswell et al.

change a public highway must be signed by twelve freeholders, six of whom shall reside in the immediate neighborhood of the proposed location, vacation, or change.

We are of opinion, however, where all those over whose lands a highway runs, join in petitioning for a change, even though it appears that if the change be granted it will result in vacating the highway and in consolidating it with another, as it were, over the lands of the petitioners, the subject-matter is, nevertheless, within the jurisdiction of the board of commissioners.

What the petitioners asked for was to have a highway which passed diagonally over their lands, in a southeasterly direction, until it intersected a highway running north and south, so changed as to run directly east, from a point described, on a section line, until it intersected the same highway at a point a quarter of a mile north of the place where it was intersected by the highway proposed to be changed. This necessarily involved the vacation of that portion of the highway which ran in a southeasterly direction, and it also involved the relocation of the highway, and the widening of an existing highway, upon the petitioners' lands. It does not follow, so long as all that was to be done was on the lands of the petitioners, that the board had no jurisdiction over the subject-matter. The purpose of the statute is to provide a convenient and inexpensive method for effecting the change of a highway on the lands of any person or persons, so long as those changes do not materially injure the public. The jurisdiction of the board over the subject depends upon whether or not it appears from the petition that the proposed change affects only the lands of those who join in the petition, or who consent thereto.

As is said in *Bowers v. Snyder*, 88 Ind. 302, "The change of a highway necessarily requires the vacation of a portion of the highway and the location of such portion upon a different line, and in this sense a vacation and location are authorized in the same proceeding."

Lyon v. Kee et al.

The fact that there was a highway of an insufficient width over the petitioners' lands at the point to which they desired to have the change made, can not affect the jurisdiction of the court over the subject-matter. It was a subject within the cognizance of the board of commissioners, under the statute, to inquire whether or not the petitioners owned the lands from and to which the proposed change was to be made, and whether or not the public would be materially injured by changing the road from the line upon which it was located so as to have it run to the same north and south road, by widening and improving another road which ran over the petitioners' lands a quarter of a mile distant at the most distant point.

The court erred in dismissing the petition. We need not determine the other questions discussed.

Judgment reversed, with costs.

Filed June 4, 1889; petition for a rehearing overruled Sept. 28, 1889.

No. 13,802.

LYON v. KEE ET AL.

HIGHWAY.—Road Districts.—Township Trustees May Reduce Number of.—Supervisor.—Under the act of April 13th, 1885 (Acts of 1885, page 202), a township trustee may reduce the number of road districts in his township, if the public interests will be thereby subserved, even though by doing so a duly elected supervisor may be deprived of official responsibility.

From the Porter Circuit Court.

Lyon v. Kee et al.

J. E. Cass, E. D. Crumpacker and P. Crumpacker, for appellant.

W. Johnston, for appellees.

OLDS, J.—The appellant was duly elected supervisor of road district No. 2, in Pleasant township, Porter county, Indiana, at the April election, 1886, and duly qualified as such supervisor. The appellee, William Kee, was the trustee of said Pleasant township. The appellees Wall and Anderson were the duly elected supervisors of road districts one and three, in said township. The complaint charges that within a short time after the election of appellant as supervisor, the appellee Kee, as trustee, maliciously, and for the purpose of depriving appellant of his office, and without any necessity therefor, changed the road districts in said township so as to abolish said road district No. 2, and added a portion of such district to district No. 1, and the other portion to district No. 3, and alleges that the appellees Wall and Anderson were threatening to, and were intending and about to, discharge the duties of supervisor in the respective portions of said district No. 2, which had been assigned to their respective districts; and a restraining order is asked to prevent them from discharging the duties of supervisor within the boundaries of said original district No. 2.

A demurrer was filed to the complaint by the appellees, which was overruled, but no complaint is made of this ruling.

Appellee Kee filed an answer in three paragraphs, the first a general denial. The second alleges that he was the duly elected, qualified, and acting trustee of said Pleasant township, and had been such trustee for one year; that when he first entered upon his duties as such trustee, he found said township divided into seven road districts, with seven supervisors, and that said districts had been so arranged and remained in that way for more than two years last past, and the township had not been redistricted for road purposes for

Lyon v. Kee et al.

more than two years prior thereto, nor had there been any change made in them during that time; that in one of the districts there was but one man to work the roads, or liable to work thereon; that in the interest of said township, and in the interest of economy, and for the benefit of the highways of said township, he deemed it necessary to divide and redistrict said township into new and suitable road districts, and acting upon what he deemed necessary, he did, on the 10th day of April, 1886, divide said township into road districts, and reduced the number of districts to five, and made a plat thereof, and filed and recorded a plat of the land in the highway records belonging to said township, and caused notice thereof to be served on plaintiff and all other parties interested, a copy of which recorded plat is filed with the paragraph of answer and made a part of the same; and it is further averred that in such change, said plaintiff's road district No. 2 was divided and cut up and assigned to other supervisors duly elected and qualified as such, all of which was done to subserve the interests of economy and the public highways, and was deemed necessary by said appellee, and that it is such redistricting and none other of which plaintiff complains.

The third paragraph of answer alleges, substantially, the same facts as the second, except it alleges that the changes in the road districts were made on petition of more than six householders and freeholders of the township residing in the immediate vicinity of the change.

To each of the second and third paragraphs of answer, appellant filed a demurrer, which was overruled, and exceptions taken. The case was put at issue by a reply in denial, and tried by the court, resulting in a finding and judgment for the defendants, the appellees. A motion for a new trial by the appellant was overruled, and exceptions taken.

The errors assigned are the overruling of the demurrers to the second and third paragraphs of Kee's answer, and the overruling of the motion for a new trial.

Hull v. The State.

The act approved April 13th, 1885 (Acts of 1885, p. 202), authorizes township trustees to divide the township into road districts, and whenever they deem it necessary to make any change in such road districts that may subserve public interests.

The paragraphs of answer show the changes made by the trustee in the road district to be such as in his discretion he had the right to make, and the demurrers thereto were properly overruled.

The finding of the court is sustained by the evidence, and the court did not err in overruling the motion for a new trial. There is no error in the record.

Judgment affirmed, with costs.

Filed Sept. 27, 1889.

120	153
121	534
120	153
152	656

No. 15,014.

HULL v. THE STATE.

CRIMINAL LAW.—*Disturbing Meeting.*—“*Salvation Army.*”—One who enters a room where a collection of persons known as the “Salvation Army” are conducting religious services according to their accustomed method, and, with his hat on and a cigar in his mouth, persists in conducting himself in an offensive manner, and so diverts attention from the services then in progress, is guilty of disturbing a meeting, within the meaning of section 1988, R. S. 1881.

SAME.—*Information.*—*Descriptive Matter.*—*Surplusage.*—*Variance.*—An information for disturbing a religious meeting is complete without an allegation that the defendant’s conduct was to the disturbance of certain named persons, and as the latter allegation is surplusage, a failure to prove that all the persons whose names are given were disturbed, is not a variance.

From the Miami Circuit Court.

Hull v. The State.

S. D. Carpenter, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

MITCHELL, J.—The appellant was found guilty of having violated the provisions of section 1988, R. S. 1881, by disturbing a collection of persons known as the "Salvation Army," who were met together for religious worship.

It is insisted that the evidence does not sustain the verdict.

A number of witnesses testified that the appellant entered a room where persons adhering to the above named society or organization were assembled for the purpose of conducting religious services according to their accustomed method, with a cigar in his mouth and without removing his hat, and that he persisted in conducting himself in this offensive manner, after he had been courteously requested to desist.

The evidence tends to show that his conduct was such as to divert the attention of the audience from the services then in progress to himself, and members of the assembly testified that they were disturbed by his behavior. There was conflict in the testimony, but it is manifest that the jury believed that which tended to establish the foregoing statement. Such conduct as that above described is wholly indefensible, and was well calculated to disturb an assemblage of worshippers. *McLain v. Matlock*, 7 Ind. 525.

It makes no difference that the method of worship of those assembled was singular or uncommon. The protection of the statute is extended to all, irrespective of creed, opinion, or mode of worship.

Persons who meet for the purpose of religious worship, by any method which is not indecent and unlawful, have a right to do so without being molested or disturbed. Whart. Crim. Law, section 1556a; Gillett Crim. Law, section 381.

After charging that the appellant unlawfully molested and disturbed a certain collection of divers inhabitants of the State, who were met together for religious worship, the in-

Hull v. The State.

formation concludes with the allegation that the acts and conduct of the appellant therein described were to the disturbance of certain persons named, who were there present at the meeting. It is now contended that there is a fatal variance, in that the proof fails to show that all those named were disturbed. The point is not well taken. It is settled that where an indictment or information contains allegations descriptive of the identity of that which is legally essential to the charge, even though the description be unnecessarily minute, the proof must agree substantially with the description. *Lewis v. State*, 113 Ind. 59, and cases cited; 1 Bishop Crim. Proc., section 485.

Where unnecessary descriptive matter is mingled with matter of essential description, the whole must be proved as laid, but "The limit of the doctrine is, that, if the entire averment, whereof the descriptive matter is a part, is surplusage, it may be rejected, and the descriptive matter falls with it and need not be proved." 1 Bishop Crim. Proc., section 487.

The information in the present case was complete without the allegation that the appellant's conduct was to the disturbance of certain persons named; and within the rule above stated, since the matter of description was merely surplusage, it was not necessary to prove it as laid. There was no error.

The judgment is affirmed, with costs.

Filed Sept. 27, 1889.

The Harrisburg Car Manufacturing Company v. Sloan.

No. 14,675.

THE HARRISBURG CAR MANUFACTURING COMPANY v.
SLOAN.

PARTIES.—*Contract.*—*Allegation of Non-Interest.*—Where a complaint upon a contract alleges that one whose name appears therein, but who did not sign the writing, has no interest in it, such person is not a necessary party.

SALE.—*Warranty.*—*Damages.*—*Tender.*—In an action for a breach of warranty it is not necessary to tender the thing bought back to the seller, but the buyer may retain it and sue for damages.

SAME.—*Trial by Jury.*—An action for damages for a breach of warranty is not of right triable by the court, and a jury may be called.

EVIDENCE.—*Letters between Parties.*—*Attorney may be Compelled to Produce.*—An attorney who has possession of a letter which passed between litigants may be compelled to produce it; and if it is relevant to the controversy, it is competent evidence.

SAME.—*Contract Concerning Different Transaction.*—A contract concerning a transaction different from the one involved in a pending action is not competent evidence.

From the Marion Circuit Court.

D. Turpie, W. E. Niblack and H. D. Pierce, for appellant.
H. N. Spaan, for appellee.

ELLIOTT, C. J.—The complaint sets forth a contract signed by the appellant and by William G. Sloan and Samuel C. Dawson. In the introductory part of the contract Jacob N. Buser is named, but the contract was not signed by him, and it is averred that he has no interest in it. As the contract was not executed by him, and as the complaint affirmatively shows that he has no interest in it, he was not a necessary party plaintiff.

The appellant's counsel are in error in assuming that the complaint seeks a rescission of the contract, for the theory of the pleading is that there was a breach of warranty with resulting damages. It is not necessary in an action for a

Graves v. Hinkle.

breach of warranty to tender the thing bought, back to the seller. In such a case the buyer may retain the property and maintain an action for damages. *Marsh v. Low*, 55 Ind. 271; *Hoover v. Sidener*, 98 Ind. 290. If the complaint sought a rescission of the contract, a very different question would be presented. *Fleetwood v. Dorsey Machine Co.*, 95 Ind. 491.

An action for damages for a breach of warranty is not of right triable by the court, and there was no error in calling a jury to try this cause.

An attorney who has possession of a letter written to a defendant by a plaintiff, may be compelled to produce it, and when produced it may be read in evidence.

Letters passing between litigants and relevant to the controversy are competent instruments of evidence.

A contract concerning a transaction different from the one involved in the pending action is not a competent instrument of evidence, and there was no error in excluding the written contract concerning a transaction different from the one out of which this controversy arose.

The judgment is affirmed, with costs.

Filed June 20, 1889; petition for a rehearing overruled Sept. 27, 1889.

No. 13,644.

GRAVES v. HINKLE.

VOLUNTARY ASSIGNMENT.—Debtor's Exemption.—Waiver.—Where a statute which confers the right of exemption also prescribes the manner in which the debtor may avail himself of it, his failure to do so at the time and in the manner prescribed is a waiver of the privilege.

SAME.—Manner and Time of Claiming Exemption.—Can not be Made After

120	157
146	594
120	157
153	378

Graves v. Hinkle.

Sale of Real Estate.—As section 2670, R. S. 1881, provides that a debtor who has executed a deed of assignment for the benefit of his creditors must claim, and have set off to him, at the time of the appraisement the property which he desires to have exempted, he can not, after the real estate has been sold in discharge of liens, then claim an exemption out of the residue of the proceeds remaining in the hands of the commissioner.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan and I. C. Batman, for appellant.

R. A. Fulk and R. W. Miers, for appellee.

MITCHELL, J.—John R. Graves, a resident householder of the State of Indiana, executed a voluntary assignment of all his property, for the benefit of all of his creditors, to William S. Pedigo. His property consisted of real and personal estate, the total value of the personalty being \$206.90. The personal property was duly appraised, and the whole of it set off to the assignor as exempt under the statute. Subsequently the assignee obtained an order to sell the real estate in order to discharge liens upon it. Hinkle was appointed a commissioner to make the sale. The property was sold, and after discharging the liens, there remained in the commissioner's hands the sum of \$850 of the proceeds of the sale, which amount was about to be turned over to the assignee to be applied to the general debts.

The assignor made an application to the court, in which the matter of the assignment was pending. He set up the foregoing, among other facts, and asked the court to order the commissioner to pay over to him the sum of \$393.10, the remainder of the \$600 which he was entitled to claim as exempt. The assignor alleges in his application that he reserved in his deed of assignment "money and property of the value of \$600 as exempt from execution," and that he has received nothing in that respect but the personal property above mentioned.

The court sustained a demurrer to his complaint or application, and thus the question is presented whether or not the

Graves v. Hinkle.

appellant is entitled to claim his exemption out of the money which came into the hands of the commissioner as stated above.

When a failing debtor has made a deed of voluntary assignment, which has been duly accepted and recorded, he has thereby transferred the legal title to all of his property to the assignee for the benefit of his creditors, subject, however, to his right to an exemption to be obtained in the manner pointed out by the statute.

It is made the duty of the appraisers to set off to him "such articles of personal property, or so much of the real estate mentioned in the inventory as he may select, so that the same shall not exceed six hundred dollars," and to specify what articles of personal property and the value thereof, or what part of the real estate, and its value, they have set apart to the assignor. Section 2670, R. S. 1881.

The remaining property transferred, and not thus selected and set off, constitutes a trust fund or estate to be administered under the statute for the benefit of the creditors, and the assignor has no more right, title, or equity in it than in any other property which he may have previously sold or conveyed, except to have the residue returned to him, if any remains after paying the debts.

It is quite true that the rigor of the common law which showed little favor to the debtor, or his family, has been ameliorated by modern legislation, which has mitigated the consequences of "men's thoughtlessness and improvidence" by enacting humane exemption laws, and while considerations of public policy and humanity demand that statutes regulating exemptions should be liberally construed in favor of the debtor, it must nevertheless be remembered that the right to claim property as exempt must be asserted at the time and in the manner provided by law. When the statute which confers the right, also prescribes the manner, in which the debtor may avail himself of it, the failure to assert the right at the time and in the manner prescribed will be deemed a

Graves v. Hinkle.

waiver of the privilege. *Boesker v. Pickett*, 81 Ind. 554, and cases cited; *Haas v. Shaw*, 91 Ind. 384.

As we have seen, the statute regulating voluntary assignments contains specific provisions in relation to the time and manner of selecting and setting off property claimed as exempt by the failing debtor. It provides how the residue, not set off in the manner provided, shall be disposed of, and how the proceeds shall be distributed. The courts have no power to supplement the statute by what would in effect be judicial legislation, and by ordering an exemption in favor of the assignor in a manner and at a time unknown to the statute, require the money belonging to the creditors to be paid to the assignor. In the absence of a statute, there would be no right to claim exemption out of property specifically conveyed by the deed of assignment. *Burrill Assignments*, section 96. As against his deed, which transfers the title to the property, the assignor can only claim the right of exemption by pursuing the method prescribed by the statute. He has a right to claim the amount out of real estate or personal property, or both, but unless prevented from doing so, without his own fault or neglect, he must assert his right in the manner and at the time prescribed by the statute. Section 2670, R. S. 1881.

In case personal property is selected which is not equal in value to the amount to which the assignor is entitled, real estate may be selected for the balance, and if the interest to which the assignor is entitled can not be segregated otherwise than by sale of the whole, his interest in the fund may be preserved, as in cases of sales upon execution, or in a manner analogous thereto. Section 710, R. S. 1881. There was no error.

The judgment is affirmed, with costs.

Filed May 16, 1889; petition for a rehearing overruled Sept. 23, 1889.

Berry v. The Town of Merom.

No. 13,840.

BERRY v. THE TOWN OF MEROM.

COSTS.—Action in Circuit Court.—Recovery of Less than Fifty Dollars.—Under the statute (section 5091, R. S. 1881), the plaintiff in an action in the circuit court for a money demand on contract is liable for costs if he recovers less than fifty dollars, exclusive of costs, unless the judgment is reduced below that amount by set-off or counter-claim.

From the Sullivan Circuit Court.

W. S. Maple, J. T. Beasley and A. B. Williams, for appellant.

J. C. Briggs, for appellee.

OLDS, J.—This is an action brought in the Sullivan Circuit Court by the appellant against the appellee for money expended for the appellee, and for work and labor performed for appellee by the appellant, at the special instance and request of the appellee, alleging the value of the services at \$40, and the money paid to be \$20. The cause was put at issue and a trial had resulting in a finding and judgment in favor of appellant for \$17.50. Motion by appellee to tax the costs to appellant sustained, and exceptions taken. The ruling on the motion to tax the costs is the only question presented in the case.

The statute provides that, "In actions for money demands on contract, commenced in the circuit or superior courts, if the plaintiff recover less than fifty dollars, exclusive of costs, he shall pay costs, unless the judgment has been reduced below fifty dollars by set-off or counter-claim pleaded and proved by the defendant." Section 5091, R. S. 1881. There was neither counter-claim nor set-off pleaded as a defence.

It is contended that the third paragraph of answer sets up

Purviance, Administrator, v. Jones.

a counter-claim, but in this we think counsel are in error. The third paragraph is a denial of any request or authority to pay the \$20 alleged to have been paid by appellant for appellee at the request of appellee.

The motion to tax the costs to the appellant was properly sustained. There is no error in the record.

Judgment affirmed, with costs.

Filed Sept. 28, 1889.

120	162
122	111
120	162
126	67
120	162
154	408
120	162
164	687
120	162
167	592

No. 13,778.

PURVIANCE, ADMINISTRATOR, v. JONES.

PROMISSORY NOTE.—Constructive Delivery.—The acts of the maker of a promissory note which the law will construe as a delivery must be such as to evince an unmistakable intention to give the note effect and operation according to its terms, and to relinquish all power and control over it in favor of the obligee.

SAME.—What is not a Delivery.—Upon being requested by his creditor to execute a mortgage to secure a debt, the debtor refused to do so, stating that he had signed a note for the amount and left it in a bank for the creditor's benefit. Upon the death of the debtor the note, duly signed, was found among his private papers. It is not stated in the special finding that the note was actually left with the bank at any time for the payee's benefit, or that it ever was under the control of the payee or of any person for his use.

Held, that a delivery is not shown.

SAME.—Compelling Delivery.—Estoppel.—Statute of Limitations.—Where one is induced to forego his purpose to secure his money before the statute of limitations has barred his claim, by the assurance of the debtor that a note has been signed and delivered to a bank for his benefit, he may, upon the death of the debtor with the note still in his possession, be entitled to compel a delivery, or to require it to be treated, in an equitable suit, as having been delivered as represented.

From the Huntington Circuit Court.

Purviance, Administrator, v. Jones.

L. P. Milligan and *O. W. Whitelock*, for appellant.
J. C. Branyan, M. L. Spencer, W. A. Branyan and *C. E. Barrett*, for appellee.

MITCHELL, J.—The only question presented on this appeal is, whether or not the facts found support the conclusion that a certain note filed by John D. Jones against the estate of Joseph W. Purviance, deceased, had been duly executed by the intestate in his lifetime. It appears that the intestate received \$1,525.98 in August, 1873, as the proceeds of the sale of a quantity of wheat sold by him belonging to Jones, who was his son-in-law. Purviance requested permission to use the money for a short time. Jones consented.

The court found, as a fact, that about the year 1880, or perhaps prior thereto, Jones requested that a mortgage be given him to secure the money which had been thus received and used, but that his father-in-law declined, assigning as a reason for his refusal that he had signed a note for the amount and left it in the bank for his son-in-law's benefit, so that the latter would lose nothing in case of his, the intestate's, death. The latter had, in fact, filled out and signed a note for the amount received for the wheat, making it payable to John D. Jones, due in one day, and bearing date August 26th, 1873. Across the back of the paper there was written the following: "This note is explained in a statement signed by me and filed." The intestate was president of the First National Bank of Huntington at the time, and continued to occupy that position until a short time prior to his death, which occurred in November, 1885. Jones never called at the bank for the note, which was found with the intestate's private papers after his death.

The foregoing constitutes a summary of the facts upon which the court stated, as a conclusion of law, that the note had been duly delivered.

It will be observed that beyond the declaration of the intestate, that he had signed a note and left it in the bank for

Purviance, Administrator, v. Jones.

the plaintiff's benefit, it does not appear that it ever had been so left, or that it had ever been out of the possession of the intestate, or under the control of the plaintiff, or of any one else for his use.

That an instrument is not complete and effectual until it has been delivered, or until that has been done which is legally equivalent to a delivery, is elementary. An actual or constructive delivery, being the final act in the execution of a note, is as essential to impart validity to the paper as is the signature of the maker. Until that is done it is a nullity. *Scobey v. Walker*, 114 Ind. 254; 1 Daniel Neg. Inst., section 63, *et seq.* The transaction is simple enough where there has been an actual delivery, but it is not always easy to determine what acts constitute a delivery by construction of law.

While it is not indispensable that there should have been an actual, manual transfer of the instrument from the maker to the payee, yet to constitute a delivery it must appear that the maker, in some way, evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use. The acts which consummate the delivery of a promissory note are not essentially different from those required to complete the execution of a deed. Act and intention are the two elements essential to the delivery of a deed, which is ordinarily effected by the simple manual transfer of possession from the grantor to the grantee with the intention of passing the title and relinquishing all power and control over the instrument itself. The final test is, did the maker do such acts in reference to the deed, or other instrument, as evince an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee. *Weber v. Christen*, 121 Ill. 91 (2 Am. St. Rep. 68); *Stone v. French*, 37 Kan. 145 (1 Am. St. Rep. 237).

All that appears in the special finding, in the present case, is a recital of a merely evidentiary character, to the effect that the intestate refused, when requested, to execute a mortgage to secure the debt, and assigned as a reason that he had signed a note and left it in the bank for the plaintiff's benefit. There is no finding that the note had, in fact, been left with the bank for the plaintiff's benefit, or that the latter in any way changed his position or purpose because of the declaration made to him, and the fact that the note was found among the intestate's private papers, with a memorandum upon it, indicates that it never was out of his possession. The only facts found by the court are, that the note was signed by the intestate, and that it was found among his private papers after his death. The declarations made by the intestate, and set out in the special finding, are nothing but evidence. If it had been found as a fact that the note had actually been left with the bank for the plaintiff's benefit, even though the intestate subsequently withdrew it, the legal conclusion might have been warranted that the paper had been constructively delivered. As we have seen, there is no finding of that character.

There is nothing in the facts found to indicate that the intestate ever surrendered control of the note, or that it ever was within the power or control of the plaintiff, or of any person for his use or benefit. It is impossible, therefore, by any facts within the finding, to support the legal conclusion that the note was delivered. *Woodford v. Dorwin*, 3 Vt. 82; 1 Parsons Notes and Bills, 49.

It may be that the evidence was such as to have justified a finding that the note had been delivered to the bank for the plaintiff's benefit; but the fact was not so found. The intestate, having received the plaintiff's money, may have induced him to forego any effort to enforce collection, upon the assurance that a note had been left with the bank, for the amount of the debt, for his benefit. If the plaintiff rested upon that assurance until the statute of lim-

Middleton *et al.* v. The State, *ex rel.* City of Elkhart.

itations had barred the debt, the estate may now be estopped to say that the note was not delivered, as against one who relied upon the statement and who would now suffer actual pecuniary loss if the note, actually signed, was not treated as having been delivered according to the representation made and relied upon.

Where money has been advanced on the faith that a note has been delivered to a third person, the promisee would be entitled to compel the delivery to be perfected. So, if the plaintiff was induced to forego his purpose to secure his money before the statute had barred his claim, by the assurance that a note had been delivered to the bank for his benefit, he may be entitled to compel the delivery of the note, or to require it to be treated, in an equitable suit, as having been delivered to the bank as represented. The facts found, however, do not make such a case.

The judgment must, therefore, be reversed, with costs, and to the end that complete justice may be done a new trial is ordered.

Filed June 25, 1889; petition for a rehearing overruled Sept. 27, 1889.

No. 13,908.

MIDDLETON ET AL. v. THE STATE, EX REL. CITY OF
ELKHART.

CITY CLERK.—*Bond.—Condition to Account for Moneys.*—Section 3095, R. S. 1881, authorizes the bond of a city clerk to be conditioned for the payment of all moneys received by him according to law and the ordinances of the city.

SAME.—*Conversion.—Sureties.—Validity of Ordinance.—Estoppel to Deny.*—In

Middleton *et al.* v. The State, *ex rel.* City of Elkhart.

an action upon the official bond of a city clerk to recover moneys collected by him pursuant to ordinances of the city, which it is alleged he failed to pay over and converted to his own use, in violation of the condition of his bond, the obligors are estopped to assert that the ordinances under which the clerk received the moneys, and which were in existence when the bond was executed, are void for the reason that under the statutes prescribing the duties of city officers all moneys belonging or due to the city must be paid to its treasurer.

From the Elkhart Circuit Court.

J. M. Vanfleet and *H. C. Dodge*, for appellants.

P. L. Turner, *O. T. Chamberlain*, *J. H. Baker*, *F. E. Baker* and *J. H. Defrees, Jr.*, for appellee.

COFFEY, J.—William D. Middleton, one of the appellants, was duly elected city clerk for the city of Elkhart, and executed his official bond to the State of Indiana in the penal sum of three thousand dollars, with the other appellants as his sureties. The condition of the bond is, that if the said William D. Middleton shall faithfully perform the duties of the said office, and pay to the person or persons entitled thereto all moneys received by him according to law and the ordinances of said city, then this bond shall be void, otherwise it shall remain in full force and effect.

At the time of the election of said Middleton as city clerk, and at the time of the execution of said bond, there was an ordinance of said city in force which authorized saloon keepers to pay to the city clerk the money due for city licenses authorizing them to retail intoxicating liquors in the city of Elkhart. There was also an ordinance in force requiring peddlers to pay to the city clerk a given sum of money for license to vend goods in said city.

It is averred in the complaint, as a breach of said bond, that said Middleton received the sum of one thousand five hundred dollars of the moneys and property of said city of Elkhart, said moneys having been received by the said William D. Middleton to and for the use of said city by virtue of his office as such clerk, under and pursuant to the

Middleton et al. v. The State, ex rel. City of Elkhart.

statutes of the State of Indiana, and under and pursuant to the ordinance of said city of Elkhart which had theretofore been duly enacted by the common council of said city, authorizing and empowering said clerk to accept and receive said money for and on behalf of said city of Elkhart; that said William D. Middleton hath made breach of the conditions of said bond in the following particulars, that is to say, that the said William D. Middleton hath at divers times to the plaintiff unknown, between the 24th day of September, 1884, and the 1st day of December, 1885, wrongfully converted all of said moneys, to wit, the sum of fifteen hundred dollars so accepted and received by him for the use of the said city of Elkhart, to his own use and behoof, and he hath failed, neglected, and refused to account for and pay over the said moneys, or any part thereof, so accepted and received by him for the use of said city to the person and persons entitled to receive the same, but so to do hath wholly refused, though thereunto often requested by the person and persons lawfully entitled to receive the same.

A demurrer to this complaint for want of sufficient facts to constitute a cause of action was overruled by the court, and the appellants excepted.

A trial resulted in a judgment against the appellants, and upon appeal to this court they assign as error that the circuit court erred in overruling the demurrer to the complaint.

It is contended on the part of the appellants that all money belonging to, or due to, a city, must be paid to the city treasurer, under the statutes prescribing the duties of city officers, and that the common council of a city has no power to authorize any other person to receive it, and that an ordinance which authorizes the city clerk to receive money due to the city is void. On the other hand, it is contended by the appellee, that as the bond in suit expressly requires the city clerk to account for and pay over all money that may come into his hands by virtue of any city ordinance, and inasmuch as he did receive the money for the recovery of which

Middleton *et al.* v. The State, *ex rel.* City of Elkhart.

this suit is prosecuted, by virtue of the city ordinances of the city of Elkhart, that it ought to be held that he and his bondsmen are estopped from denying the validity of the ordinances under which the money was received.

Section 3095, R. S. 1881, in force at the time of the execution of the bond in suit, provides that the mayor, each member of the common council, city clerk, assessor, civil engineer, street commissioner, marshal, city attorney, and treasurer shall each, before entering upon the duties of his office, take and subscribe an oath * * * to support the Constitution of the United States, and the Constitution of the State of Indiana, and to faithfully and honestly discharge the duties of his office. * * * And each of said officers, except members of the common council, shall, in like manner, execute a bond with approved security, payable to the State of Indiana, in such penal sum as the common council shall, by resolution or ordinance, order and direct, conditioned for the faithful performance of the duties of his office, and the payment of all moneys received by him according to law and the ordinances of such city: *Provided, however,* that in no case shall the mayor's bond be fixed at a less sum than three thousand dollars, nor shall the treasurer's bond be fixed at a less sum than double the amount of the estimated tax duplicate of the current year.

It will thus be seen that the bond in suit comes within the letter of the statute. It is claimed, however, that the statute should be limited, by construction, to such officers only as may under the statutes of the State collect or receive the money belonging to the city. Conceding this to be true, still we do not think a condition in the bond requiring the city clerk to pay over such money as might come into his hands by virtue of the ordinances of the city would be void.

In the case of *Inhabitants v. Forrest*, 1 Pennington (N. J.), 107, a constable executed his official bond containing conditions not required by the statute upon the subject. In answer to the argument of counsel to the effect that such con-

Middleton et al. v. The State, ex rel. City of Elkhart.

ditions were void, KIRKPATRICK, C. J., said: "1st. As to the latter of the causes, to wit, that the condition of the bond is more extensive than the act requires, it does not appear to me to have much weight. It may be considered as a bond merely voluntary, to secure to the township, the faithful discharge of this office. And surely there can be nothing in this, contrary to law, to reason, or sound policy. I apprehend, some confusion has arisen from likening this to certain other official bonds, such as bail bonds and others, where the condition is expressly prescribed by law, and all others declared to be void. But that is not the case here. There is no such prohibitory or nullifying clause in the act. It is a voluntary bond for a lawful purpose, for securing the performance of an important and necessary office; and, as such, I think it can not be impugned in the law."

But we do not think we are required to limit the act in question by the construction contended for by the appellants. There is nothing in the language used by which such an intention can be inferred, and we know of no valid reason why the act should be thus limited. We are not only of the opinion that the bond, as executed, was authorized by the statute, and is valid in all its conditions, but we think the appellants are estopped from denying the validity of the ordinances under which the money is alleged to have been received. *Commonwealth v. Wolbert*, 6 Binney, 292; *Postmaster-General v. Rice*, Gilpin, 554; *Mayor, etc., v. Harrison*, 30 N. J. 73.

In the case last cited, the common council of the city of Hoboken, without any legal authority, created the office of collector of assessments for street improvements, and appointed Harrison as such collector, who executed his official bond, as such, with the appellants as sureties. He collected a large amount of money as such collector, for which he failed to account, and his sureties sought to defend an action on his bond upon the ground that the act of the common council in creating the office and in appointing Harrison was *ultra vires* and void. The court held that the common coun-

Middleton *et al.* v. The State, *ex rel.* City of Elkhart.

cil had no power to create such an office, but held, also, that Harrison and his sureties were estopped from denying the validity of the ordinance creating the office and requiring him to collect the money. The Chief Justice, in discussing the objection urged against the validity of the ordinance creating the office, and the bond given pursuant to its terms, said: "By the condition of this bond it is recited, that whereas the said William B. Harrison has been duly appointed by the mayor and common council of the city of Hoboken as *collector of assessments for street improvements*, that if he should well and truly pay to the treasurer of said city all money which he might collect or receive as such collector, etc. By this condition, the sureties have admitted that his election was by the mayor and common council, and agreed to be sureties for the payment of all moneys which by virtue of the appointment, thus made, he might receive. They are estopped from denying that Harrison was *de facto* a collector of assessments for street improvements. Their liability to pay over what he has collected is *co-extensive* with his. In a suit for moneys collected by him as such, neither the officer *de facto* nor his sureties may set up the invalidity of his appointment in bar of the action. * * * It would seem to be eminently impolitic to permit the parties to such a bond to escape its obligations by contradicting the recitals of the bond, and thus retain from the public authorities the taxes received by an officer *de facto*."

In this case, the ordinances under which the principal received the money now sought to be recovered were in existence at the time the bond in suit was executed. His sureties undertook, voluntarily, that he should account for all moneys collected under such ordinances, and we know of no valid reason why they should not live up to that agreement. By this undertaking they enabled the principal to obtain the possession of the money, and we do not think they should be permitted to say now that he received it without authority.

The demurrer to the complaint is joint, on behalf of the

Fosher *et al.* v. Williams, Executor.

principal and sureties, so that if it states a good cause of action against the principal the court could do no less than overrule it. The sureties could make no defence which the principal could not make. Section 5534, R. S. 1881. But we think it states a good cause of action against all the defendants, and that the court did not err in overruling a demurrer thereto.

Judgment affirmed.

Filed Sept. 28, 1889.



120	172
135	691

120	172
137	173

120	172
141	476

120	172
144	453

120	172
149	367

120	172
158	443

120	172
166	360

120	172
166	360

No. 14,854.

FOSHER ET AL. v. GUILLIAMS, EXECUTOR.

WIDOW.—Will.—Election.—Statutory Requirements.—Where a widow dies within a year after the death of her husband, without having made an election in writing, signed, acknowledged, and filed with the clerk as provided by the statute (Elliott's Suppl., section 428), as to whether she would take under her late husband's will or under the law, she will be deemed to have taken under the will, notwithstanding the fact that she, being ignorant of the statutory requirement, had in fact determined to take under the law, and in pursuance of that determination had taken actual possession of one-third of the land left by her husband.

SAME.—Right to Elect is Personal.—Death before Election.—The right to elect is strictly personal and can be exercised only by the widow, and if she dies before the time for election has expired, the right expires with her, in the absence of a statute authorizing its exercise afterwards by her heirs or representatives.

From the Putnam Circuit Court.

T. E. Ballard and *E. E. Ballard*, for appellants.

J. J. Smiley, *W. G. Neff* and *J. L. Myers*, for appellee.

MITCHELL, J.—John Fosher, who died testate on the 8th

Fosher et al. v. Williams, Executor.

day of April, 1888, devised his real and personal estate to his widow, who was his childless second wife, for life, and provided that at her death the property should be distributed among certain of his children by a former marriage. The widow died in November, 1888, less than a year after her husband's death, and the executor of the last will and testament petitioned the court for an order to sell all the real estate, alleging that it was necessary to sell it, in order to make assets to pay debts and legacies. The heirs resisted the application to sell, so far as it applied to one-third of the land, and alleged that the widow rejected the provision made for her by the will, and elected to take the one-third in fee under the law. They claimed that at her death the one-third which she took as widow, descended to them in fee simple, free from the debts of their father, according to the construction placed upon sections 2483 and 2487, R. S. 1881; *Caywood v. Medsker*, 84 Ind. 520; *Bryan v. Uland*, 101 Ind. 477. The validity of their contention depends upon whether the widow took under the will or under the statute. It is alleged that after the testator's death the widow renounced the will, so far as it made provision for her, and elected to take under the law, and that by agreement with the other heirs she took possession of a portion of the real estate equivalent to one-third in value, which was by mutual agreement set off to her, but that she never made any written election as required by statute, for the reason that she had no knowledge or information that any such election was necessary.

Section 41 of an act entitled "An act regulating descents and the apportionment of estates," as amended by an act approved April 13th, 1885, reads as follows: "If lands be devised to a woman, or a pecuniary or other provision be made for her by the will of her late husband, in lieu of her right to lands of her husband, she shall take under the will of her said husband, unless she shall make her election whether she will take the lands so devised, or the provision so made, or whether she will retain the right to one-third of the land of

Fosher et al. v. Guilliams, Executor.

her late husband ; but she shall not be entitled to both unless it plainly appear by the will to have been the intention of the testator that she should have such lands, or pecuniary or other provision thus devised or bequeathed in addition to her rights in the lands of her husband. Such election shall be in writing, signed by such woman and acknowledged before some officer authorized to take the acknowledgment of deeds, and shall be made within one year after said will has been admitted to probate in this State, and be filed and recorded in the office of the clerk of the circuit court in which such will is probated." Elliott's Suppl., section 428.

It is conceded that the widow did not make an election in accordance with the above statute, but it is insisted that because she made an election, *in fact*, by taking actual possession of one-third of the land, her election became as effectual as if made according to the provisions of the statute. This result is said to follow, from the fact that she did not know, and was not informed, that a written election was necessary. This position is not maintainable.

According to the imperative language of the above statute, if there be a will in which lands are devised to a widow "she shall take under the will, unless she shall make her election" in the manner therein prescribed within one year. The right of a wife to take an interest in the real estate of which her husband died seized is a statutory right, and where provision is made for her by the will of her husband, her right to take under the law depends upon conditions precedent, to be performed by her within one year. Those conditions are minutely set forth in the statute above set out, which forms part of the law regulating the descent and apportionment of estates. The renunciation of the will and the election, to take under the statute must be made in substantial compliance with the statute which confers the right. In all cases where there is a will the widow is conclusively bound by it, unless she renounces its provisions and elects

Fosher et al. v. Guilliams, Executor.

in the manner pointed out in the statute. *Stephens v. Gibbs*, 14 Fla. 331; *Waterbury v. Netherland*, 6 Heisk. 512.

The case in hearing is, in all respects, parallel with *Cowdrey v. Hitchcock*, 103 Ill. 262. In that case a widow had accepted an award set off to her by appraisers, and it was afterwards claimed that she had thereby renounced the provisions of the will and elected to take under the law. The court, remarking upon a statute in all essential respects similar to that which controls the present case, said: "Here is a complete mode pointed out by the statute, under which a widow may renounce the provisions of a will, and if she fails to pursue the course pointed out by the statute within one year from the date letters testamentary are issued, she is, by the express terms of the statute, deemed to have elected to take under the will."

As was well remarked in *Price v. Woodford*, 43 Mo. 247: "The right of election is a statutory privilege, conferring new and important benefits, and outside of the statute has no existence. It must, therefore, be exercised in substantial compliance with it." *Ewing v. Ewing*, 44 Mo. 23; *Dougherty v. Barnes*, 64 Mo. 159.

The right to elect is strictly personal, which can be exercised by the widow alone, and although she die before the time for election has expired, in the absence of a statute authorizing it to be made afterwards by her heirs or representatives, the right of election expires with her. Woerner Law of Admin. 270.

If, through any fraud or contrivance of those interested in the estate, the widow was prevented from making an election, a court of equity might find means of affording relief against those who perpetrated the fraud. There is, however, no question of fraud involved in the present case, and we therefore decide nothing upon that subject.

The judgment is affirmed, with costs.

Filed Sept. 28 1889.

190	176
135	379
120	176
137	591
120	176
140	90
120	176
144	211
144	431
144	659

No. 14,891.

KENNEGAR v. THE STATE.

CRIMINAL LAW.—*Trial upon Information.*—*Grand Jury, Sessions of.*—The circuit or criminal courts are not bound to call a grand jury for each term of court or for any particular time in a term, so that, under section 1679, R. S. 1881, a person who has been arrested in vacation for any offence, except treason and murder, and recognized to appear at the succeeding term of court, may be prosecuted upon affidavit and information if no session of a grand jury has intervened.

SAME.—*Receiving Stolen Goods.*—*Amendment of Affidavit.*—Where a defendant is charged before a justice of the peace with the offence of receiving stolen goods, and is recognized to appear in the circuit court to answer the charge, the State may there file an amended affidavit and an information thereon in which the accused is charged in separate counts with receiving stolen goods and with the larceny of the same goods.

SAME.—*Verdict.*—*Harmless Defect.*—*Judgment.*—Where a verdict is defective in a particular harmless to the defendant, a judgment which follows the verdict is not void, and sentence thereon may be pronounced.

SAME.—*Election by State.*—Where a defendant is charged in separate counts with receiving stolen goods and with the larceny of the same goods, a refusal to require the State to elect upon which count it will try the defendant is not erroneous.

SAME.—*Juror.*—*Previously Expressed Opinion.*—*New Trial.*—To entitle a defendant to a new trial on account of a previously expressed opinion by a juror, he must show affirmatively that at the time he accepted such person as a juror he was ignorant of the facts disqualifying him.

From the Starke Circuit Court.

H. R. Robbins and *S. J. Peelle*, for appellant.

L. T. Michener, Attorney General, *H. A. Steis*, Prosecuting Attorney, *J. H. Gillett*, *G. W. Beeman* and *J. C. Fletcher*, for the State.

OLDS, J.—The appellant was convicted of receiving stolen goods, knowing the same had been stolen. The prosecution was commenced before a justice of the peace, and the preliminary examination was held before the justice on the 2d day of March, 1889, and the defendant was recognized to

Kennegar v. The State.

appear at the March term, 1889, of the Starke Circuit Court, which commenced on the 9th day of March, 1889.

During the March term, 1889, of said court, the prosecuting attorney by leave of court filed an amended affidavit and information. There were two counts in each, one count in each charging the crime of receiving stolen goods, and the other charging grand larceny. There was a plea in abatement filed by the defendant, which presents the question of the right of the State to prosecute a charge of felony where, as in this case, the prosecution has been commenced in vacation and the defendant recognized to appear at the succeeding term of court, and no grand jury having been empanelled at such term prior to putting the defendant upon trial.

It is contended that the statute requires the empanelling of a grand jury at each term of the circuit court, and that a person arrested in vacation and recognized to appear at a succeeding term of court, can only be prosecuted by a submission of the charge to the grand jury and the finding of an indictment.

Section 1387, R. S. 1881, requiring the clerk to draw the names of six competent persons, who shall be summoned as the grand jury for the ensuing term, and providing for the clerk issuing a venire therefor, as the court or judge in vacation may direct, does not require that the grand jury shall be summoned for any particular time in the term. The court in term, or the judge in vacation, can order them summoned to appear on any particular day of the term which he deems proper.

Section 1679, R. S. 1881, provides that "All public offences, except treason and murder, may be prosecuted in the circuit and criminal courts by information based upon affidavit in the following cases:

"*First.* Whenever any person is in custody, or on bail, on a charge of felony or misdemeanor, except treason and murder,

Kennegar v. The State.

and the court is in session, and the grand jury is not in session or has been discharged."

This clearly contemplates that the court may be in session and the grand jury not in session at a time other than after the grand jury has been discharged, and at such time a prosecution may be by information, and if these sections which have been referred to by counsel were the only statutory provisions upon the subject, this cause was properly prosecuted on affidavit and information, and the ruling of the court in sustaining the demurrer to the plea in abatement was proper. But there is another statute, approved March 10th, 1873 (2 R. S. 1876, p. 418), which leaves the calling of a grand jury to the discretion of the court, providing it shall be convened twice in every year. This statute is consistent with the other sections relating to the empanelling of grand juries, and we are not aware of its having been repealed, and it is still in force, and is in conflict with the theory advanced by counsel, that it is imperative on the part of the court to convene a grand jury at each term of court.

It is next urged that there is a variance in the charge made in the affidavit filed before the justice of the peace and the affidavit and information filed in the circuit court, and that the court erred in overruling the motion to quash the affidavit and information.

There was an amended affidavit and information filed in the circuit court, and a motion to quash the amended affidavit and information, for the reason that the charge in the amended affidavit and information is not the same as the charge in the original affidavit filed before the justice. The affidavit before the justice charged that the defendant received the stolen goods, knowing them to have been stolen; the amended affidavit and information charge, in the first count of each, that the defendant accepted, received, and concealed the stolen goods, knowing them to have been stolen, and in the second count charge the larceny of the goods. It is clear that the charge made in both is for the

Kennegar v. The State.

same offence. In the affidavit before the justice the only averment was that the defendant "received" the goods; in the amended affidavit and information it is alleged, in the first count of each, and upon which count the defendant was convicted, that he accepted, received and concealed, and as a precaution he is charged, in a second count of each, with the larceny of the same goods. This is proper practice. The two offences were properly joined. *Short v. State*, 63 Ind. 376; *Gandolpho v. State*, 33 Ind. 429; *Mershon v. State*, 51 Ind. 14; *Choen v. State*, 85 Ind. 209.

The amendment was authorized under section 1735, R. S. 1881, and the court committed no error in overruling the motion to quash the affidavit and information.

The verdict of the jury assessed the punishment of the defendant at imprisonment for one year and a fine of one dollar. The defendant moved for a *venire de novo*, which was overruled, and the ruling is assigned as error. The court should have sent the jury back and had the verdict corrected, but the defendant was not harmed by this omission, and the court did not err in pronouncing sentence. The judgment of the court is in accordance with the verdict. *Shafer v. State*, 74 Ind. 90.

Error is assigned on the overruling of the motion for a new trial. One cause for a new trial is the refusal of the court to require the State to elect on which count the cause should be prosecuted. This was not error. See *Short v. State*, *supra*, and other authorities hereinbefore cited.

The misconduct of Henry Peelle, a juror, is assigned as a cause for a new trial, and affidavits are filed in support of the motion. The affidavits show an expression of an opinion by the juror prior to the trial that the defendant was a thief, and ought to be convicted. It does not appear but that the defendant and his counsel had full knowledge of the statements and opinion of the juror before accepting him as a juror to try the case; nor does the bill of exceptions contain his examination touching his competency as a juror; and

Hayes, Administrator, v. Sykes.

it appears by the affidavits of other jurors that the juror Peelle was one of the last jurors to agree to a verdict of guilty. To entitle the defendant to a new trial on account of a previously expressed opinion by the juror he should have shown affirmatively that he was ignorant of the facts stated in the affidavits at the time of accepting Peelle as a juror. *Achey v. State*, 64 Ind. 56; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed June 8, 1889; petition for a rehearing overruled Oct. 10, 1889.

180 180
121 166
180 180
140 575

No. 14,125.

HAYES, ADMINISTRATOR, v. SYKES.

WILL.—Real Estate.—Charge upon for Payment of Debts.—Personal Liability of Devisees.—Where a will provides that real estate devised to the testator's wife and mother shall be held liable, in equal portions, to pay his debts if his personalty is not sufficient for that purpose, "and to this end I make a charge upon my estate so devised to perform the same," the devisees do not, by accepting the testamentary provision, become personally liable for the indebtedness of the estate.

FAMILY SETTLEMENTS.—Decedent's Estate.—Claims.—Payment by Devisees.—Extinguishment.—Where one devisee, who holds enforceable claims against the testator's estate, enters into a contract with another devisee, upon whose land the claims are a charge, in pursuance of which the latter pays to the former full consideration for the claims, the settlement is valid, in the absence of fraud or mistake, and the claims involved will be deemed extinguished.

From the Dearborn Circuit Court.

Hayes, Administrator, v. Sykes.

N. S. Givan and W. N. Hauck, for appellant.

G. M. Roberts and C. W. Stapp, for appellee.

BERKSHIRE, J.—This litigation commenced with the filing of a claim against the estate which the appellant represents. Originally the claim was made up of two paragraphs, numbered one and two, respectively. The court sustained a demurrer to the first paragraph, and the appellee filed an additional paragraph numbered three. Demurrers were overruled to the second and third paragraphs, and an answer filed in two paragraphs, the second of which was a general denial. A demurrer was filed and sustained to the first paragraph and an exception taken.

The only errors assigned which we care to notice are, that the court erred in overruling the demurrer to the second paragraph of the claim, in sustaining the demurrer to the first paragraph of answer, and in overruling the motion for a new trial. As the same strictness in pleading is not required in the filing of claims against decedents' estates that is required in ordinary civil actions, the second paragraph of the claim may be good, possibly; but as we are not entirely satisfied that it is sufficient from the investigation which we have made, and as it does not become necessary to pass upon its sufficiency, in view of the conclusion to which we have arrived in reference to the ruling of the court in overruling the motion for a new trial, we do not decide as to whether it is sufficient or not.

In passing upon the demurrer to the answer, and that an understanding may be had of the question presented, it will be proper to state briefly the allegations made in the second paragraph of the claim, which is the paragraph on which the allowance made by the court depends. Enoch Hayes, the decedent, died testate in November, 1875, and his will was duly probated in Hamilton county, Ohio, where he resided, on the 7th day of December, 1875, and in Dearborn county, Indiana, on the 22d day of the same month and

Hayes, Administrator, v. Sykes.

year. The entire real estate of which he died the owner, was situated in said counties of Hamilton and Dearborn. By his will he devised his Hamilton county real estate to the appellee, his mother, which was of the value of \$6,500, and his Dearborn county real estate to his wife, now Anna Hayes Cooper, which is of the value of \$15,000. The personal property left by the testator was worth less than \$1,000, which was exhausted in the payment of debts, and left remaining an indebtedness amounting to \$10,000; that by the terms of the will one-half of this said indebtedness was made a charge upon the real estate devised to the appellee, and the other half a charge upon the real estate devised to the said Anna Hayes Cooper. On the 7th day of said month of December, Harry L. Cooper qualified as executor in Hamilton county, Ohio, and on the 22d day of said month, he thus qualified in Dearborn county, Indiana; that in order to save said real estate from sale for the payment of debts, the appellee and the said Anna Hayes Cooper took up and held for their protection claims against said estate amounting to \$5,000, which was done with the consent and approval of the said executor.

On the 27th day of January, 1882, an accounting took place between the appellee and the said Anna Hayes Cooper, and it was thereby ascertained that it would be necessary for the appellee to pay to the said Anna Hayes Cooper \$1,725 to equalize her with the latter on account of the excess of claims paid by her over what the appellee had paid, and to make them equal the appellee leased for three years to the said Anna Hayes Cooper and her husband certain real estate which she owned in Dearborn county, Indiana. That afterwards it turned out that the indebtedness of said estate was much greater than was anticipated, and the real estate that was devised to the appellee was sold by the executor for the payment of debts; and the theory of the claim is, that the appellee became subrogated to the rights of creditors to the extent of the said sum of \$1,725 paid to the said Anna

Hayes, Administrator, v. Sykes.

Hayes Cooper, and entitled to an allowance therefor against the estate.

It may be well to state further that Cooper was removed as executor of the estate in Dearborn county, and the appellant became administrator *de bonis non*.

The answer rests on the following item in the will: "I will that in case there is not money enough in the hands of the executors of my father's will to pay all my just debts, I then desire that the property herein devised to my wife Anna and to my mother Mary Ann Sykes shall be held liable in equal proportions to pay the same, and to this end I make a charge upon my estate so devised to perform the same."

It is alleged in the answer that the appellee and the said Anna Hayes Cooper accepted the provisions as made for them by the will, and the theory of the answer is that they thereby became personally liable for the indebtedness of the estate, and therefore the right of subrogation does not exist.

It is not our opinion that the devisees became personally liable because of their acceptance of the devises made to them by the will. By the terms of the will they took title to the real estate subject to the encumbrances and charge that was placed upon it. *Copeland v. Copeland*, 89 Ind. 29; *Hancock v. Fleming*, 103 Ind. 533.

In *Porter v. Jackson*, 95 Ind. 210, and other cases referred to by counsel for the appellant, a personal liability was imposed on the devisee. The provisions of the will were such in each of those cases that by an acceptance of its terms a personal liability was assumed.

In our judgment the answer was bad, but were we of a different opinion there would be no available error, because all facts provable under this paragraph were competent under the general denial. R. S. 1881, section 2324. The court should have sustained the motion for a new trial.

This case may be said to be a counterpart of the case of *Burkham v. Hayes*, 116 Ind. 136. Burkham, the appellant in that case, filed his claim as assignee of the said Anna

Hayes, Administrator, v. Sykes.

Hayes Cooper against the appellee, who is the appellant in this case. The indebtedness which she claimed to be due her, and which she attempted to assign to Burkham, was asserted on account of claims which she had paid that were owing from the said estate. The same written contract that was introduced in evidence in that case was introduced in this case, and as it is set out in the opinion delivered in that case we need not set it out. The opinion was delivered by ELLIOTT, J., and we copy from it as follows: "This contract controls the case. It is founded on a sufficient consideration, and so operates as to extinguish the claims assigned to Burkham. Mrs. Sykes had an interest in the land devised to her, but burdened with a charge, and she, therefore, had a right to contract for the removal of this burden. This she did. Mrs. Cooper undoubtedly had a like interest in her deceased husband's estate, and might, perhaps, have paid the claims and enforced them against the estate, but she chose to extinguish them by a contract with another devisee. Having received from that devisee full consideration for the claims which she had paid, and having elected to take that consideration rather than enforce the claims assigned to her, they ceased to be enforceable. They were paid by the consideration which moved to her from Mrs. Sykes. Mrs. Sykes had a right to ask that the claims should be extinguished by the consideration which she paid, and to this Mrs. Cooper acceded. Thus a valid and effective settlement of those claims was made, and that settlement can not be annulled, for neither fraud nor mistake is shown. Adjustments in the nature of family settlements are favored by law, and this adjustment was of that character. *Wright v. Jones*, 105 Ind. 17 (27). As the contract governs the case and fully sustains the judgment of the trial court, it is unnecessary to discuss other questions."

All that is said as to the claims paid by Mrs. Cooper applies with full force to the appellee's claim in this case; and it may be said in addition that the appellee paid no part of

Powers *et al.* v. The Town of New Haven.

the indebtedness of the estate, but by the arrangement with Mrs. Cooper the equities between the two were adjusted, and that was all.

The question as to the appointment of Holman judge *pro tempore* by McMullen, judge *pro tempore*, was not properly saved, but see *Cargar v. Fee*, 119 Ind. 536, which disposes of the question when properly raised.

The judgment is reversed, with costs.

Filed June 21, 1889; petition for a rehearing overruled Oct. 11, 1889.

No. 7742.

POWERS ET AL. v. THE TOWN OF NEW HAVEN.

TOWN.—Sidewalks.—Power to Compel Building of.—Under the statutes in force in 1875, the board of trustees of an incorporated town had power to compel the grading and building of sidewalks, whenever, in their opinion, the public convenience required it, and if lot-owners refused to do the work, to let a contract for the improvement, pay the cost out of the treasury and collect the same from such lot-owners by suit.

SAME.—Authority to Make Improvement.—Estoppel of Property-Owner.—If the owner of property in a town stands by, and, without objecting, permits improvements to be made which benefit his property, he is estopped to afterwards deny the authority of the town to make the improvements.

PLEADING.—General Denial.—Demurrer.—The Supreme Court must decide a case upon the record as it comes to it, and where the record shows that the trial court sustained a demurrer to an answer of general denial, the error is available.

SAME.—Joint Answer.—Supreme Court.—Assignment of Error.—Where an answer filed in the trial court is the joint answer of all the defendants to the action, infants as well as adults, it must be so considered on appeal, and a joint assignment of error upon a ruling thereon is proper.

From the Allen Circuit Court.

120	185
152	452

120	185
159	365
120	185
162	265

Powers et al. v. The Town of New Haven.

H. C. Hartman, R. S. Taylor and S. L. Morris, for appellants.

A. Zollars, for appellee.

COFFEY, J.—The complaint in this cause alleges that the town of New Haven is a municipal corporation duly organized under the laws of this State; that on the 4th day of August, 1875, the board of trustees of said town being of the opinion that public convenience required that the sidewalks on the north side of Main street, in said town, should be graded and planked or otherwise paved from John Fisher's butcher-shop east to Broadway street, in said town, passed an ordinance to grade and plank said sidewalk between said points, a copy of which ordinance is filed with and made a part of the complaint; that after the passage of said ordinance, notice was duly given to each of said defendants by the duly authorized agents of said town to grade and plank or gravel said sidewalk in front of their said lots in accordance with the provisions of said ordinance, said sidewalk being in front of and adjoining said lots; that defendants neglected and refused to either gravel or plank or grade said walks in front of said lots; that after such refusal, to wit, on the 13th day of October, 1875, said board of trustees ordered the marshal of said town to make and post up notices for bids for the grading and planking of said sidewalks between said first mentioned points, and adopted specifications according to which said work should be bid for, and according to which said grading and planking should be done, a copy of which said specifications is filed with the complaint; that said marshal on or about the 14th day of October, 1875, did post up said notices in which was also a copy of said specifications, and said notices were so posted up for more than ten days at the most public places in said town; that after said notices had been so posted for more than ten days, the said marshal of said town received bids for the doing of said work, and Anthony Bingnot, being the lowest and best

Powers et al. v. The Town of New Haven.

bidder, the said marshal let to him the doing of said work for the sum and price of one hundred and forty dollars; that said Bingnot at once commenced said work and completed it before the 6th day of November, 1875, in accordance with the specifications aforesaid; that on the 6th day of December, 1875, the said board of trustees being in session at a regular meeting, said marshal reported to them the cost of said work, being one hundred and forty dollars, which was duly audited by said board of trustees, and the amount, one hundred and forty dollars, paid to said Anthony Bingnot out of the treasury of said town; that the said defendants during the time said ordinance was being passed, and at the time said work of grading and planking said sidewalk was commenced and was being done, were well aware of the fact, and although they stood by and allowed said work to be done without objection, yet they have ever since refused, and still refuse, to pay the cost of the same or any part thereof. In the copy of the ordinance filed with the complaint, the lots in question are described as lots Nos. 21, 22, 23, and 24, on the old plat of the town of New Haven.

Subsequent to filing this complaint, the plaintiff filed a supplemental complaint, which, after reciting the allegations in the original complaint, alleges that on the — day of —, 1876, the defendant, Volney Powers, died intestate, and that his interest in said lots descended to, and became the property of, Jesse Powers and Maggie Powers, who are made parties defendant.

A demurrer to this complaint, for want of sufficient facts to constitute a cause of action, was overruled by the court, and the appellants excepted. The appellants filed an answer to this complaint, consisting of thirteen paragraphs.

The first is a general denial.

The second avers that the appellants protested against the work referred to in the complaint on the ground that it was being done without their consent and without authority.

The third avers that the improvement specified in the

Powers et al. v. The Town of New Haven.

ordinance filed with the complaint is for less than one square, viz.: for four-tenths of one square, or block.

The fourth avers that the ordinance filed with the complaint is void, because said board of trustees declared therein that in their opinion the public convenience required that the sidewalk on the north side of Main street should be graded and planked, or covered with gravel; that said ordinance does not compel the owners of lots adjoining said street to grade and pave, or plank the same; that instead thereof it orders that the owners of lots Nos. 21, 22, 23 and 24, adjoining such street, shall grade, plank or gravel the same along the north side of Main street from John Fisher's butcher shop to Broadway street; that there are other lots than those named in said ordinance adjoining such street on the north side, the owners of which are not compelled by said ordinance to grade or pave the same in front of their lots.

The fifth avers that the ordinance filed with the complaint is void, because the defendants are ordered to grade, plank, or cover with gravel the sidewalks on the north side of Main street from John Fisher's butcher shop east to Broadway street; that said butcher shop is situated ten feet west from the southwest corner of said lot twenty-four, and not upon or adjoining any of said lots; that said ten feet is in front of and adjoining lot six; that said lot No. 6 never was owned by these defendants, or either of them.

The sixth avers that two-thirds of the resident owners of real estate in number or value have not petitioned for the improvement in said ordinance specified; that a majority of all the resident owners on said street, or on the north side thereof, or on the square in which said lots are situated, have not petitioned for the said improvement, and that said improvement so ordered to be made by said ordinance is for less than one square or block.

The seventh avers that at the time of passing said ordinance there was no building on the north side of said Main street known as John Fisher's butcher shop.

The eighth avers that neither the plaintiff nor Anthony Bingnot has graded, planked, or covered said sidewalk with gravel according to the terms of said ordinance, but instead thereof the said Bingnot has erected a trestlework, in the nature of a bridge six feet high from the ground, with high railing on either side thereof, to wit, three feet high, completely cutting off all ingress and egress to and from said lots.

The ninth avers that the plaintiff has never established any grade on said Main street ; that the height of the crown of said Main street at the time of the passage of said ordinance was irregular, varying in front of said improvements from six inches to two feet from a level from highest point to highest point.

The tenth avers that the plaintiff passed and enacted an ordinance No. 6 on the 13th day of March, 1867, and passed and enacted an amendment or amended ordinance No. 6 on the 27th day of June, 1867, requiring sidewalks to be made in front of said lots 21, 22, 23 and 24, and elsewhere, and providing that the grade then given should be the grade of said sidewalk until a permanent grade should be established ; that the owners of said lots fully complied with the requirements of said ordinance No. 6, to the acceptance of the street commissioner of said town ; that since then the plaintiff has never established a permanent grade for said sidewalk.

The eleventh avers that the plaintiff has wrongfully erected a trestlework in front of the lots described in the complaint, pursuant to an ordinance, preventing ingress and egress to said lots to the damage of the defendants in the sum of \$300, and they seek to recover judgment for such damages.

The twelfth avers that at the time of passing the ordinance set out in the complaint, and before, and ever since, there has been published and in general circulation in said town a newspaper called the New Haven Palladium; that no other paper was at said time, to wit, August, 1875, published in

Powers et al. v. The Town of New Haven.

said town; that said ordinance was not published in said newspaper.

The thirteenth is the same as the twelfth, except that it avers in addition that the ordinance was not posted in five public places in said town before the advertisement for bids, as averred in the complaint was made by the marshal of said town for said work.

The court sustained a demurrer to each of the foregoing answers, and the appellants excepted.

A trial of the cause resulted in a finding for the appellee, and a decree ordering said lots, or so much thereof as might be necessary, sold to pay the amount found due.

The appellants assign as error:

1st. That the court erred in overruling the motion for a new trial.

2d. That the court erred in overruling the motion in arrest of judgment.

3d. That the complaint does not contain facts sufficient to constitute a cause of action.

4th. That the court erred in overruling the demurrer to the complaint.

5th. That the court erred in sustaining the demurrer to the several paragraphs of the answer.

Under the statute in force at the time the work in controversy was done, the board of trustees of any incorporated town in this State had the power to compel the grading and building of sidewalks upon any street, when in their opinion the public convenience required it. If the owners of the lots adjoining such sidewalk failed or refused, when properly required by such board of trustees to grade and pave, or plank such sidewalk, it was made the duty of the marshal of such town forthwith to let out the grading, and paving or planking of such sidewalk to the lowest bidder, first giving ten days' notice by posting up written notices thereof in three public places in such town for that length of time. When such work was completed it was the duty of the

marshal to report the same, with the cost thereof, to the board of trustees, whose duty it was to audit the cost of such work and pay the same out of the town treasury as other claims against the corporation were audited and paid. The trustees were then authorized to collect the same immediately by suit against the owners of the lots adjoining such improvement, and to enforce such claims as a lien against the lots. 1 R. S. 1876, p. 896.

The complaint shows a substantial compliance with law in making the improvement therein set out. In addition to this it is averred that the appellants, while the ordinance was being passed and while said improvements were being made, with a full knowledge of the same, stood by and made no objection thereto and permitted the same to be done.

It is now quite well settled that if the owner of property in a city stands by and permits improvements to be made which benefit such property, and makes no objection to such improvement, he will be estopped from denying the authority of such city to make the improvements. *Taber v. Ferguson*, 109 Ind. 227; *Ross v. Stackhouse*, 114 Ind. 200; *City of Evansville v. Pfisterer*, 34 Ind. 36; *Jenkins v. Stetler*, 118 Ind. 275; *Johnson v. Allen*, 62 Ind. 57.

This doctrine of estoppel does not rest wholly upon the statutes, as contended by the appellants, but it rests upon the reasonable ground that it would be inequitable to permit a party to stand by and permit others to make improvements for the benefit of his property, without objecting, and hold such benefits and refuse to pay for the same. We see no reason why the doctrine should not be applied to improvements made in towns as well as cities. We think the complaint states a good cause of action and that the court did not err in overruling the demurrer thereto.

It follows from what we have said that each of the affirmative answers pleaded by the appellants is bad. Each of said paragraphs, except the eleventh, attempts to answer the whole complaint, and each ignores the estoppel set up in the

Powers et al. v. The Town of New Haven.

complaint. We know of no principle of law upon which the eleventh paragraph of the answer can be sustained. We do not think the court erred in sustaining the demurrer to the several affirmative answers of the appellants. The court did err, however, in sustaining the demurrer to the first paragraph of the answer.

No doubt the condition of the record was brought about by some mistake, as contended by appellee, but we must try the case by the record as it comes to us.

It is contended by the appellee that no injury could have been sustained by the appellants by reason of sustaining the demurrer to the general denial, inasmuch as the record discloses the fact that the guardian *ad litem* afterwards filed a denial to the complaint, and there was a trial. The evidence is not in the record, and we are, therefore, unable to say what did occur at the trial.

It appears by the record that one of the appellants is an infant. It is contended that as such fact appears, we must presume that the answer filed in the circuit court was the answer of the adult defendants alone, and that, hence, the assignment of error here should have been on behalf of the adult defendants alone, and not a joint assignment.

The answer filed in the circuit court, however, is the joint answer of all the defendants, and we are not at liberty to presume that it is an answer of part of them only. Being a joint answer the error assigned here may be joint.

Judgment reversed, with directions to overrule the demurrer to the first paragraph of the answer, and for further proceedings not inconsistent with this opinion.

Filed June 20, 1889; petition for a rehearing overruled Oct. 16, 1889.

Barger v. Hoover et al.

No. 13,785.

BARGER v. HOOVER ET AL.

MORTGAGE.—Married Woman.—Husband and Wife.—Tenants by Entireties.—

Consideration.—Party in Interest.—Mrs. L., her husband joining, conveyed real estate to H. and wife jointly. For \$1,000 of the purchase-money H. contracted to build for Mrs. L. a house. To secure the performance of the contract, H. and wife executed to Mrs. L. a mortgage upon the real estate. Afterwards H. entered into a contract with B., whereby the latter agreed to build the house for \$800. He did build it, and when it was completed there was due him \$445. The house was accepted by Mrs. L., and she released her mortgage. To secure B., H. and wife executed a note and mortgage on the same real estate, payable to Mrs. L., who did not know of the execution of the same until she was requested by B. to endorse them to him, which she did. In an action by B. to foreclose the mortgage,

Held, that such mortgage is upon a sufficient consideration, and is a valid and enforceable obligation as against both H. and his wife.

Held, also, that Mrs. L. has no interest in the note or mortgage, and that B. is entitled to recover thereon for his own benefit.

From the Elkhart Circuit Court.

J. M. Vanfleet, J. H. State and L. Chamberlain, for appellant.

O. T. Chamberlain and P. L. Turner, for appellees.

OLDS, J.—This was an action by appellant against the appellees on a note and mortgage given by appellees Hoover and Hoover to the appellee Leshner, and by her endorsed to appellant. The appellee Amanda Leshner filed an answer, that when she endorsed the note and mortgage she was a married woman.

Hoover and Hoover answered, alleging that they were husband and wife, and owned the land mortgaged by entireties, and that the debt sued for was the individual debt of the husband. They also filed an answer of want of consid-

Barger v. Hoover et al.

eration. There was a trial by the court and a special finding of facts and conclusions of law stated by the court, exceptions to conclusions of law by appellant, and appellant also filed a motion for a new trial.

The finding of facts shows that on the 30th day of March, 1885, the defendant Amanda Leshler, and her husband conveyed the land described in the mortgage sought to be foreclosed to the defendants Jonas O. and Cora B. Hoover, who were at that time and have ever since been husband and wife; that as a consideration for such conveyance Hoover and Hoover, on said date, conveyed to the said Amanda Leshler a house and lot, and of the consideration there remained unpaid a balance of \$1,000. Jonas Hoover entered into a written contract with Amanda Leshler agreeing to build her a house for the stipulated price of one thousand and forty dollars, Leshler to pay forty dollars cash on the completion of the house, and the remaining one thousand dollars to be in satisfaction of the balance due upon the land, and null and void upon the completion of the house, in pursuance of said contract. Hoover and Hoover executed a mortgage on land in Lagrange county to secure the performance of the contract; afterwards said mortgage on the Lagrange county land was cancelled, and in lieu thereof Hoover and Hoover executed a mortgage on the land purchased of Leshler to secure the performance of said contract. Afterwards Jonas O. Hoover contracted with the appellant, Barger, to build the house he had contracted to build for Mrs. Leshler, for which he was to pay appellant \$800. Appellant built the house in accordance with the contract. When it was completed there was a balance due Barger of \$445. On the 23d day of October, 1885, the house was turned over to Mrs. Leshler, and she accepted it and executed a release of the mortgage and delivered the release to one P. L. Turner, with instructions to deliver the same to Hoover if appellant filed no lien against the property within the time allowed by law, or upon a receipt of a release of the plaintiff. The plaintiff

Barger v. Hoover *et al.*

threatened to take a lien upon the house and property turned over to Mrs. Leshar, and on the 14th day of November, 1885, at the request of the plaintiff, and to secure his debt, Hoover and Hoover executed the note and mortgage sued upon for \$445, and made the same payable to said Amanda Leshar, but the said Amanda did not know of the execution of the same until she was called upon to endorse the note, and she endorsed the same to the plaintiff, at his request; that the indebtedness to plaintiff has never been paid; that there is due on the note and mortgage five hundred and forty-one dollars.

The court stated as conclusions of law: 1st. That plaintiff is entitled to recover against the defendant Jonas O. Hoover the sum of \$541, without relief from valuation and appraisal laws. 2d. That the plaintiff is not entitled to a foreclosure of the said mortgage, nor to a sale of the property therein described.

At the time of the purchase of the land and conveyance of the same by Amanda Leshar and husband to the Hoovers, the Hoovers were indebted to said Amanda in the sum of \$1,000, the balance of the purchase-money. The contract on the part of Jonas O. to build the house did not, nor did the contract with the appellant to build the house, satisfy or operate as a payment of the debt to Mrs. Leshar. At the time of the commencement of this suit there still remained \$445, with interest, of the joint debt of Hoover and Hoover which neither of the Hoovers had paid. *Bristol Milling, etc., Co. v. Probasco*, 64 Ind. 406; *Travellers Ins. Co. v. Chappelow*, 83 Ind. 429; *Olvey v. Jackson*, 106 Ind. 286.

The husband, Jonas O. Hoover, undertook and contracted to pay the debt by building a house for Mrs. Leshar, but he never did it; he never built the house nor did he pay appellant for building it. The only person that contracted to pay the debt for Mrs. Hoover was her husband, and had he done so it would have operated as a payment and to her benefit, and she is entitled to the benefit of his contract so far as he

Barger v. Hoover et al.

executed and performed it. The mortgages to Mrs. Leshar were valid, for they were for the security of her own debt. *Security Co. v. Arbuckle*, 119 Ind. 69. She received a valid consideration for them, and at the time of the execution of the note and mortgage in suit there was remaining unpaid of the joint debt of her and her husband the sum of \$445. Mrs. Hoover had not paid the debt, neither had her husband paid it. The note and mortgage sued upon were given as a satisfaction for the joint debt of Hoover and Hoover, and it was a valid consideration for the note and mortgage.

The facts found show that Mrs. Leshar had no interest in the note; that it was given for the benefit of appellant and he was entitled to recover upon it. The house which she contracted to be built for her had been constructed, and when the contractor and builder had been paid the amount due him for its construction, she had no further interest, and the note was given for the debt due him, and he was the proper party to sue upon the note.

The court erred in its conclusions of law.

Judgment reversed, with costs, with instructions to the court below to restate its conclusions of law and render judgment in favor of appellant against appellees Hoover and Hoover for the amount found due, and for the foreclosure of the mortgage.

Filed June 5, 1889; petition for a rehearing overruled Oct. 10, 1889.

The State, *ex rel.* Shepard, Receiver, *v.* Sullivan *et al.*

No. 14,964.

THE STATE, EX REL. SHEPARD, RECEIVER, *v.* SULLIVAN
ET AL.

RECEIVER.—*Official Bond Executed by Debtor.—Receiver May not Enforce.*—
The receiver of an insolvent debtor has no right of action to enforce the collection of the penalty of an official bond executed by the debtor and his sureties.

SAME.—*Sureties on Debtor's Official Bond.—Not Affected by Decree Appointing Receiver.*—The sureties on an official bond executed by an insolvent debtor are not concluded by a decree appointing a receiver, in a proceeding to which they are not parties, from resisting the enforcement of the bond against them at the suit of the receiver.

From the Marion Superior Court.

H. N. Spaan, S. Claypool and W. A. Ketcham, for appellant.

J. S. Duncan and C. W. Smith, for appellees.

ELLIOTT, C. J.—The relator was appointed receiver, on the petition of the creditors of John E. Sullivan, and seeks to recover the full penalty of the official bond executed by the defendant Sullivan as principal, and the appellees as sureties. This bond was executed by the obligors to secure the faithful performance by Sullivan of the duties of the office of clerk of Marion county. The condition of the bond was broken by the embezzlement by Sullivan of large sums of money paid to him as clerk and due to many persons.

It is our judgment that, upon the facts appearing of record, the persons to whom the money appropriated by the defaulting clerk belonged, are the only ones who can maintain actions on his official bond, and that there is no right of action in the receiver.

The relator was appointed a receiver of the assets of Sullivan, and was invested with authority to collect and dispose of those assets and to disburse the proceeds; but this author-

190	197
195	390
180	197
139	603
120	197
149	61
149	543
120	197
170	694
170	695

The State, *ex rel.* Shepard, Receiver, v. Sullivan *et al.*

ity vested in him no right of action on Sullivan's official bond. The enforcement of the bond against Sullivan and his sureties is not the collection of a claim due Sullivan, but on the contrary, is the enforcement of a claim against him. To enforce a claim against a debtor is a very different thing from enforcing one in his favor, and it is inconceivable that a person with authority to collect claims due the debtor can enforce claims against him. That the debtor is liable as principal, and others are liable with him as sureties, can make no difference, for the rule which controls is this: No right of action vests in a receiver to enforce a bond executed by a debtor whom he represents. The receiver was appointed to secure what was due Sullivan, and not to secure judgments upon bonds executed by him, and it is not within the scope of the receiver's authority to prosecute actions upon such bonds. It is to be kept in mind that a receiver has no original, intrinsic authority, for all the authority he possesses is that delegated to him by the interlocutory decree appointing him. His authority is, therefore, a derivative one, and can not extend beyond the decree from which it is derived.

The rights of action vested in a receiver are transmitted by the order of appointment, but their original source is the debtor, whose assets and rights are placed in the receiver's hands by the order of the court. The general rule is that a receiver can not have, nor be made to have, any right of action not vested in the debtor, and there are, as we now remember, only two exceptions to this general rule; one is that a receiver may maintain a suit to set aside a fraudulent conveyance, and the other is that where the statute authorizes it the receiver of an insolvent corporation may sue the stockholders. The first instance is a real exception, but the second is, in truth, no more than an apparent one, for the corporation and its stockholders are distinct beings, in legal contemplation; so that the receiver of a corporation who sues a stockholder does not in reality sue the debtor whose estate he represents. But it is not necessary to discuss the

Sage v. The State.

180	901
127	17

No. 15,071.

SAGE v. THE STATE.

CRIMINAL LAW.—Felony.—Accessory before the Fact.—Indictment.—Sufficiency of after Verdict.—Construction of Statute.—Section 1734, R. S. 1881, providing that whenever an accused person is to be charged as an accessory before the fact, “the following (or words of similar import) shall be inserted after the statement of the offence committed by the principal: ‘And the said A. B. was accessory before the fact to the said felony’ (here set forth how he aided and abetted the principal),” is mandatory, and an indictment which does not conform thereto, although sufficient in other respects, is bad, even as against a motion in arrest of judgment.

SAME.—Repeal of Statute.—Will not Cure Previous Error.—An indictment must be good according to the statute in force at the time the judgment is pronounced, and the subsequent repeal of the statute will not cure an error previously committed.

From the Grant Circuit Court.

W. H. Carroll, A. E. Steele and J. A. Kersey, for appellant.
L. T. Michener, Attorney General, *S. W. Cantwell*, Prosecuting Attorney, *J. H. Gillett and H. J. Paulus*, for the State.

MITCHELL, J.—The appellant was indicted and convicted as an accessory before the fact to the crime of murder.

The question for consideration is as to the sufficiency of the indictment after verdict to sustain a judgment as against a motion in arrest.

Concerning accessories we find the following in the code of criminal procedure: “Whenever the person accused is to be charged as an accessory before the fact, the following (or words of similar import) shall be inserted after the statement of the offence committed by the principal: ‘And the said A. B. was accessory before the fact to the said felony’ (here set forth how he aided and abetted the principal).” Section 1734, R. S. 1881.

With the exception that the above section of the statute

Sage v. The State.

was entirely disregarded, the indictment is unquestionably sufficient, and conforms with the approved precedents. *Ulmer v. State*, 14 Ind. 52.

Is the statute mandatory, or may its provisions be dispensed with by construction? The crime of murder is defined in section 1904, R. S. 1881, and section 1788, R. S. 1881, declares that "Every person who shall aid or abet in the commission of any felony; or who shall counsel, encourage, hire, command, or otherwise procure such felony to be committed,—shall be deemed an accessory before the fact." These two sections must be looked to in order to ascertain what shall constitute a person an accessory before the fact, to the crime of murder.

Section 1734 declares that in charging an accused with being an accessory before the fact, certain specified words—or words of similar import—shall be inserted in the indictment after the statement of the offence committed by the principal. All of these sections are, therefore, to be regarded in determining whether or not the indictment is sufficient. *State v. Lay*, 93 Ind. 341.

Statutes are supposed to express the will of the sovereign power of the State, and it is the plain duty of courts to give effect to the legislative will without scrutinizing the reasons which may have induced the enactment of an unambiguous statute. Interpretation and construction are allowable when different meanings may be attributed to the language employed, but when the language used in expressing the legislative will is not only plain, but admits of but one meaning, the task of interpretation can hardly be said to arise. *Endlich Statutes*, section 4.

Courts may construe and interpret when construction and interpretation are necessary in order to discover the true meaning of a statute, but when the meaning is discovered, it is no more the province of the court to set aside a statute constitutionally enacted than it is the right of any other citizen to do so. Here is an express statutory requirement directing

Sage v. The State.

in terms that not only the specific acts from which the inference might be drawn that the accused was an accessory before the fact to the felony alleged to have been committed, should be set out in the indictment, but that the general statement that he "was accessory before the fact to said felony," or words of similar import, should be inserted. Under this statute, "Not only must all the circumstances essential to the offence be averred, but these averments must be so shaped as to include the legal characteristics of the offence." Whart. Cr. Pl. and Pr., section 153. These words characterize the offence in general terms, and are made by statute an essential element in the charge of being accessory to a felony. An indictment which wholly disregards this statutory requirement does not state facts sufficient to charge a public offence.

"Where the statute prescribes or implies the form of the indictment, it is usually sufficient to describe the offence in the words of the statute, and for this purpose it is essential that these words should be used. In such case the defendant must be specially brought within all the material words of the statute; and nothing can be taken by intendment." Whart. Cr. Pl. and Pr., section 220.

Where the defect in an indictment is the omission to state matter expressly required by statute, the omission will not be cured by verdict. *Burroughs v. State*, 72 Ind. 334; *State v. Gove*, 34 N. H. 510.

Justice must use right means in attaining its ends, and its ends when attained must be such as the law allows. "Human laws are meant merely to conserve the outward order of society. And a part of this order, not less essential than any other part, consists in pursuing the exact methods which the law has laid down in bringing criminals to justice." 1 Bishop Cr. Proc., section 93; *Id.*, section 89.

As was aptly said in *Shepherd v. State*, 54 Ind. 25, "Here, the indictment is bad for non-conformity to the requirements of the statute. And if this court, for the sake of sustaining the conviction in this case, construes away some of the re-

Sage v. The State.

quirements of the statute, the true test by which to determine the validity of an indictment is destroyed, and in each succeeding case we shall be expected to depart further and further from the statute, till the only rule left will be the mere discretion of the court in each particular case."

It is a rule of pleading even in civil causes, that the omission of an averment which the statute makes essential to the statement of a cause of action is not cured by a verdict. *Mansur v. Streight*, 103 Ind. 358, and cases cited. This rule should have special application in criminal pleading. Society is more interested that even the guilty should be punished according to law than that they should be merely punished.

The language of the statute can not be regarded as merely permissive. It can not be supposed that the Legislature intended to leave it wholly discretionary with the pleader whether or not the omitted averment should be inserted. Such a construction would be trifling with the statute, and would rest upon the assumption that the Legislature had no motive whatever in its enactment. Where the public or third persons have an interest in the enforcement of a statute, its terms are to be regarded as mandatory. *Nave v. Nave*, 7 Ind. 122; *Endlich Statutes*, section 312.

It is proper to remark that after the trial and conviction of the appellant, section 1734 was repealed (see *Elliott's Suppl.*, section 304), but the repeal can not cure an error which was committed while the previous law was in force. It was necessary that the indictment should be good according to the statute in force at the time the judgment was pronounced.

The court erred in overruling the appellant's motion in arrest.

Judgment reversed.

The clerk will make the proper order for the return of the defendant.

Filed Oct. 15, 1889; petition for a rehearing overruled Oct. 19, 1889.

 Lucas v. The Pennsylvania Company.

No. 13,825.

LUCAS v. THE PENNSYLVANIA COMPANY.

RAILROAD.—*Platform Between Stations.—Duty to Keep in Repair.—Liability for Negligence.*—Where two railroad companies use in common a platform extending from the station of one to that of the other, and over which their passengers may be expected to pass in going from one station to the other, they are bound to keep it in safe condition, and are both liable for injuries resulting to passengers from their failure to do so.

From the Porter Circuit Court.

E. D. Crumpacker, P. Crumpacker and H. A. Gillett, for appellant.

J. Brackenridge, for appellee.

ELLIOTT, C. J.—The special verdict rendered in this case is set forth in the opinion delivered in the case of *Louisville, etc., R. W. Co. v. Lucas*, 119 Ind. 583, and the only question presented by this appeal is, whether the facts stated entitled the appellant to a judgment against the appellee.

We have no brief or argument from the appellee, and we are unable to discover any ground upon which the judgment can be sustained, for the facts stated very satisfactorily show that both of the defendants were guilty of a breach of duty. The appellant had alighted from the train of one of the defendants, and was making her way to the proper place to take passage on the train of the other. She was not an intruder as to either, but she was entitled to protection from both. Neither had a right to permit a platform which it was natural that a reasonable and prudent person would traverse in passing from one station to the other to become and remain unsafe. The situation of the platforms and the surroundings were such as to make it natural for a person alighting, as the appellant did, from a train of the one defendant, intending to take passage on the train of the other,

120	205
123	418
120	205
132	536
120	205
142	485
143	131
143	700
120	205
152	670
120	205
157	420
120	205
158	67

Lucas v. The Pennsylvania Company.

defendant, to pursue the course she took in her attempt to pass from the one station to the other.

The defendants were bound to know that passengers who intended to pass from the one station to the other might be misled by the situation and construction of the platform, and it was the duty of both to provide against injury to passengers by making safe the platform used by them in common, and upon which one going from one station to the other would probably walk. *Longmore v. Great Western R. W. Co.*, 19 C. B. N. S. 183; *McKone v. Michigan Central R. R. Co.*, 51 Mich. 601; *Louisville, etc., R. R. Co. v. Wolfe*, 80 Ky. 82; *Knight v. Portland, etc., R. R. Co.*, 56 Me. 234; *Hulburt v. New York Central R. R. Co.*, 40 N. Y. 145.

In the appeal of the Louisville, New Albany and Chicago Company, we stated the rule of law which governs railroad companies in cases like this; and that is, perhaps, all that we need do, but the rule is so well stated in a very recent work that we quote it: "The depot and connected grounds, visited by coming and going passengers, should be fitted up with a careful regard to their comfort and safety. The approaches, the tracks around, the platforms and places for entering and leaving the cars, the passages to the cars; every spot likely to be visited by passengers seeking the depot, waiting at it for trains, or departing; should be made safe and kept so, and at reasonable times should be lighted. And passengers not in fault, injured through a neglect of this duty, may have compensation." Bishop Non-Contract Law, section 1086. Many decisions are adduced in support of the text.

The fact that the negligence of the Louisville, New Albany and Chicago Company concurred with that of the appellee does not relieve the latter from liability. *Louisville, etc., R. W. Co. v. Lucas, supra*, and authorities cited; *Town of Knightstown v. Musgrove*, 116 Ind. 121; *Colegrove v. New York, etc., R. R. Co.*, 20 N. Y. 492; *Cuddy v. Horn*, 46 Mich. 596; *Kain v. Smith*, 80 N. Y. 458; *Wabash, etc., R. W. Co. v. Shacklet*, 105 Ill. 364.

Staser *et al.* v. Hogan *et al.*

Judgment reversed, with instructions to render judgment on the special verdict against both of the defendants in the action.

Filed June 18, 1889; petition for a rehearing overruled Sept. 19, 1889.

No. 14,587.

STASER ET AL. v. HOGAN ET AL.

WILL.—*Contest of.*—*Witness.*—*Competency.*—*Opinion.*—In a proceeding to contest a will, the heirs and devisees are competent witnesses as to the mental condition of the testator, and, not being experts, such witnesses must state the facts upon which they base their opinions, including the conduct of the testator, what he said, and, perhaps, a full history of his life.

SAME.—*Mental Incapacity.*—*Undue Influence.*—*Evidence.*—*Views of Testator as to Making Wills.*—In a proceeding to contest a will on the grounds of mental incapacity and undue influence, a conversation between the testator and another in relation to the former's views upon the subject of making wills, in which he spoke strongly against giving one child a larger share of the estate than another, is competent.

SAME.—*Mental Condition.*—*Cross-Examination.*—A witness having testified as to the physical and mental condition of the testator during the last year of his life, a question on cross-examination as to whether the witness would, during that period, have taken a note from the testator, and whether he ever heard anybody question his sanity, is not competent.

SAME.—*Domestic Relations of Testator.*—Where it is sought to set aside a will on the grounds of insanity and undue influence, it is competent to show the relations existing between the testator and his family, as to whether they were friendly or otherwise.

SAME.—*Condition of Testator's Mind.*—*Scope of Inquiry.*—To enable the jury to determine as to the condition of the testator's mind at the date of the will, it is proper to show its condition at any time prior thereto.

120	207
123	345
123	410
120	207
124	19
124	447
125	50
125	449
120	207
129	407
120	207
131	134
120	207
134	323
134	452
135	146
135	415
120	207
137	648
138	66
120	207
141	119
142	88
142	199
120	207
149	466
151	656
120	207
153	545
120	207
157	50
120	207
166	33
120	207
169	440
170	214
120	207
171	50

Staser et al. v. Hogan et al.

SAME.—*Opinion of Witness.*—The testator having been a lawyer, and having conducted the trial of a cause before a justice of the peace a short time prior to his death, the justice might properly detail the facts as to the manner in which the testator conducted the trial, but his mere opinion that he managed the cause “well and shrewdly” is not competent.

SAME.—*Impeachment of Witness.*—Where a witness, upon facts stated by him, gives his opinion that the testator was of sound mind, it is proper to show, by way of impeachment, that he had stated out of court that the testator was childish, and that he was going crazy.

SAME.—*Contradiction as to Collateral Matter.—Interest and Hostility of Witness.*—The general rule that where a witness is cross-examined on matters collateral to the issues, his answers can not be contradicted by the party putting the questions, has no application where it is sought to show that the witness has an interest in the case, or that he is hostile to one of the parties to the action.

SAME.—*Verdict.—Support of Evidence.*—Where a complaint to contest a will charges both mental incapacity and undue influence, a general verdict setting aside the will, will withstand an attack upon the ground that it is not supported by the evidence, if there is evidence tending to support one of the charges made by the complaint.

SAME.—*Instruction to Find for the Defendant.*—Where, in a proceeding to contest a will, there is some evidence tending to support the charge of undue influence, it is proper to refuse to instruct the jury that they should find for the defendants on that issue on the ground that there is no such evidence.

EVIDENCE.—*Objection to.—Practice.*—Where a witness who is competent to testify as to some matters is placed upon the stand for examination, an objection then interposed that such witness is not competent to testify as to certain other matters, thus imposing upon the court the burden of watching the testimony and separating the competent from the incompetent, is not well taken.

SAME.—*Admission of Incompetent Testimony.—Motion for New Trial.*—Where some of the testimony of a witness is competent, a motion for a new trial which is predicated upon the admission of testimony of such witness must point out, with clearness and certainty, the particular evidence objected to.

MISCONDUCT OF COUNSEL.—*Argument.—Practice.*—It is only where the court is called upon to correct the injury resulting from the misconduct of counsel during the trial and refuses to do so, whereupon an exception is reserved, that any question can be presented in relation thereto on appeal, unless the injured party moves to discharge the jury.

INTERROGATORIES TO JURY.—*New Trial.—Assignment of Error.*—The refusal of the court to require a jury to answer an interrogatory more

Staser *et al.* v. Hogan *et al.*

specifically may be assigned as a cause for a new trial, but it can not be independently assigned as error in the Supreme Court.

INSTRUCTIONS TO JURY.—*Argument upon Legal Questions.*—*Discretion of Court.*—As the trial court has power to hear argument and authorities bearing upon legal questions involved in its instructions, its discretion in doing so must be harmfully abused in order to constitute available error.

SAME.—*Supplying Omissions.*—A judgment will not be reversed on account of an instruction which is meaningless as it appears in the record, but which, upon supplying evidently omitted words, is correct as an abstract legal proposition.

SPECIAL JUDGE.—*Power of.*—*Final Disposition of Cause.*—Where a cause is tried before a special judge, and a verdict returned on the last day of the term of court, such special judge has authority to hear a motion for a new trial filed on the first day of the next term, and to make a final disposition of the cause.

VERDICT.—*Support of Evidence.*—*Interrogatories.*—If a general verdict is supported by the evidence, a motion for a new trial, assigning as a reason that it is not so supported, should be overruled, without regard to the manner in which interrogatories are answered.

SAME.—*Answers to Interrogatories.*—Where there is nothing in the record to show that the verdict is not based upon the charge which the evidence tends to support, it is wholly immaterial whether or not the answers to interrogatories addressed to another branch of the case are supported by the evidence.

From the Posey Circuit Court.

A. C. Tanner, W. W. Ireland, J. S. Buchanan, C. Buchanan and W. E. Niblack, for appellants.

G. V. Menzies, D. B. Kumler and J. E. McCullough, for appellees.

COFFEY, J.—This action was commenced by the appellees against the appellants in the circuit court of Vanderburgh county, to contest and set aside the will of John C. Staser, deceased. There are four causes for contest alleged, viz. :

1st. That the said John C. Staser was of unsound mind at the time he executed the will.

2d. That said pretended will was not the will of the said John C. Staser.

3d. That said pretended will was unduly executed.

Staser et al. v. Hogan et al.

4th. That said will was procured by the undue influence of the defendants, Clinton Staser, Clara Staser, his wife, and others to the plaintiffs unknown.

The cause was venued to the Posey Circuit Court, where the same was put at issue by a general denial of all the defendants. The cause was tried by a jury who returned a general verdict for the appellees. In addition to the general verdict the jury returned answers to interrogatories. Over a motion for a new trial, the court rendered judgment on the verdict, setting aside the will in controversy, and defendants below appeal to this court and assign as error:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2d. No paragraph of the complaint states facts sufficient to constitute a cause of action.

3d. The court erred in overruling the defendants' demurrer to the first and second paragraphs of the complaint, and to each of them.

4th. The court erred in refusing to require the jury to answer more fully and specifically interrogatory No. 22, which had been submitted to them for answer.

5th. The court erred in overruling the defendants' motion for a new trial.

6th. The court erred in overruling the defendants' objection to Hon. R. D. Richardson's hearing and passing upon defendants' motion for a new trial.

7th. The court erred in overruling the defendants' objection to Hon. R. D. Richardson's rendering judgment upon the verdict herein and in rendering said judgment.

8th. The court erred in overruling defendants' objection to Hon. R. D. Richardson's making any order in this cause at the January term, 1888, of the Posey Circuit Court.

9th. The court erred in overruling defendants' objection to the appointment of Hon. R. D. Richardson as special judge in this cause at the January term, 1888, of the Posey Cir-

Staser et al. v. Hogan et al.

cuit court, or to the said Richardson making any order herein at said term.

In the brief of the appellants, no objection to the complaint is pointed out or discussed. The first, second, and third assignments of error must, therefore, be deemed waived.

The fourth is an alleged error occurring on the trial, and was proper matter to be assigned for a new trial, but can not be assigned as error in this court. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551; *West v. Cavins*, 74 Ind. 265; *Ogle v. Dill*, 61 Ind. 438; *Patterson v. Lord*, 47 Ind. 203.

Many reasons were assigned by the appellants for a new trial, which we will consider in the order in which they are set forth in the motion.

The first and second reasons assigned for a new trial are, that the verdict of the jury is not sustained by sufficient evidence, and that the verdict is contrary to law.

There is evidence in the record which tends to support the verdict of the jury, and while there may be a seeming preponderance of the evidence in favor of the appellants upon the issues joined, for the many good reasons given in the adjudicated cases, we are not at liberty to disturb the verdict for that reason. The weight of the testimony is for the jury. So well is this rule settled, and so well is it understood, that we deem it unnecessary to cite authorities.

The third and sixteenth causes assigned for a new trial, involve the same legal question and are discussed in the briefs of counsel together, and it is not, therefore, improper to consider them without separation. They seek to raise the question of the competency of Mrs. Hogan, one of the legatees under the will of the deceased, to testify in the cause. It is urged on behalf of the appellees that the objection to the admissibility of the testimony given by this witness was not of such a character as to reserve the question sought to be raised here, and that the motion for a new trial was so indefinite that it does not present the question of the competency of Mrs. Hogan as a witness.

Staser et al. v. Hogan et al.

The record discloses the fact that the appellees called Catharine Hogan, one of the plaintiffs below, and one of the appellees here, as a witness, and propounded to her this question: "Where was your father born?"

The appellants interposed the following objection: "We object to the witness as being incompetent except to testify to the testamentary capacity of the testator."

The objection was overruled, and the appellants excepted. The appellants, by their counsel, then stated to the court that they "objected and excepted to everything except that which conduces to show the testamentary capacity of the testator; in other words, that which may be proven by the heirs, and nothing else, and the exception to embrace everything the witness may say that does not conduce to show mental capacity, or the want of it, on the part of the testator."

The objection being overruled by the court, the witness was permitted to detail the history of the births, marriages, and deaths of the family of the deceased testator.

At a subsequent period in the trial, the record shows that this witness was again called as a witness on behalf of appellees, and before any question had been propounded to her the appellants stated to the court: "The defendants object to this witness testifying to anything that occurred prior to the death of the testator, and to all communications, except upon the questions and conversation that tend to prove the mental capacity of the decedent, and we object to her testifying to any act or conversation of any of the devisees, for the reason that the statements of one devisee can not be used either for or against the will; and to save time, and not take up time unnecessarily, this objection to apply to all that this witness may say, as well as to other devisees or heirs," which objection the court overruled, and the appellants excepted.

The witness then testified: "I gave my age the other day. I was raised on the homestead, and lived (there) till I was married. While there I helped to do the work in the house,

Staser et al. v. Hogan et al.

helped the boys in the field, and helped my father in the field."

The record states that "the defendants object, because she is an incompetent witness on that subject, and they objected to this answer, and all other questions and answers heretofore made by her not tending to show the sanity or insanity of Mr. Staser. On all other matters she is incompetent under the statutes, and to save time we make the same objections to all other questions not in relation to the mind of decedent hereafter to be asked."

The objection was overruled, and excepted to, and the witness then testified generally in relation to her connection with the family of the deceased before her marriage; to the conduct of, and conversations with, the deceased with a view of giving her opinion as to the condition of his mind at the time of the execution of the will in controversy, as well as to matters which occurred since the death of the testator.

The third cause assigned for a new trial is as follows:

"3d. For error of law occurring at the trial, and excepted to at the time, by the defendants, in this, to wit, in admitting in evidence and permitting Catharine Hogan, a witness produced and sworn by the plaintiffs, to testify as follows."

Then follows all the testimony of Catharine Hogan when first on the witness-stand, followed by this language: "The testimony of Catharine Hogan, she being a daughter of deceased, John C. Staser, his heir and devisee in his will (is), therefore, incompetent under the statute to such facts, and is also a party plaintiff."

The sixteenth reason assigned for a new trial is as follows:

"16. In admitting in evidence, and permitting Kate Hogan, a witness offered by plaintiffs, to give the following testimony."

Then follows all the testimony given by the witness when on the witness-stand the second time, and this reason concluding as follows: "Such testimony being incompetent, immaterial, and irrelevant, she being a daughter of John C.

Staser et al. v. Hogan et al.

Staser, a devisee under his will and a party to this suit, being incompetent under the statute to testify to such facts, is further incompetent, immaterial, and irrelevant for the reason that it details a conversation about Clara Staser, who is not a party to the suit or heir of the testator or devisee under his will."

Section 496, R. S. 1881, makes all persons, whether parties to, or interested in, the suit, competent witnesses in civil actions or proceedings, except as otherwise provided by statute. Section 499 provides that in all suits by or against heirs or devisees, founded on a contract with, or demand against, the ancestor, to obtain title to or possession of property, real or personal, of or in right of such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor.

In the case of *Lamb v. Lamb*, 105 Ind. 456, it was settled that, in a proceeding like this to contest a will, the heirs and devisees are competent witnesses as to the mental condition of the testator.

As Mrs. Hogan was not an expert witness, before she could give her opinion as to the mental condition of the testator, it was necessary that she should state the facts upon which such opinion was based. This, of necessity, included the conduct of the testator, what he said, the manner in which he conducted himself, and might, perhaps, include his full history up to the time of his death.

Much of the testimony, therefore, given by Mrs. Hogan, if not all, was competent, and she was a competent witness as to the matters therein detailed by her. Under the form of objection here made the burden was thrown upon the court to watch her testimony, and when a question was asked, or an answer made, to which she was not competent to testify, the court was required to interpose an objection. We do not think such a burden could be imposed upon the court.

It is not error for the trial court to overrule an objection.

Staser et al. v. Hogan et al.

to the testimony of a witness made before such testimony is given, and when the court can not know what it will be. *Wolfe v. Pugh*, 101 Ind. 293. Nor is it the duty of the court to separate competent from incompetent evidence. That duty rests upon counsel. *Cuthrell v. Cuthrell*, 101 Ind. 375.

So, in the motion for a new trial, the court, in order to ascertain whether any illegal testimony had been permitted to go to the jury, would be required to look through all the testimony of the witness, and separate the legal from the illegal. This is a duty that the court can not be required to perform. Causes for a new trial must be assigned with clearness, certainty, precision, and particularity. *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442; *Bayless v. Glenn*, 72 Ind. 5; *Coryell v. Stone*, 62 Ind. 307; *Grant v. Westfall*, 57 Ind. 121; *Ball v. Balfé*, 41 Ind. 221; *Wright v. Potter*, 38 Ind. 61.

With the sixteenth reason for a new trial are set out thirty-eight pages of evidence, embracing all the testimony of the witness while on the stand, and to require the court to examine this mass of testimony with a view of ascertaining whether any that was incompetent had crept into the record would be to impose upon the court a burden wholly unwarranted by the law. In our opinion no question is presented by the record as to the competency of the testimony given by Mrs. Hogan.

The appellees called one Maidlow, and, over the objection of the appellants, proved by him a conversation with the testator in relation to the testator's views upon the subject of making wills, in which he spoke strongly against giving one child a larger share than another.

It is conceded by the appellants, in their brief, that this testimony would have been proper if it had been confined to what the deceased said in relation to the disposition of his own property, but it is contended that he was talking about the dispositions of property made by others. But we un-

Staser et al. v. Hogan et al.

derstand that he was speaking on that occasion of a line of conduct to be pursued by himself as well as others, and we are unable to perceive any valid objection to the evidence. The same objection was made to the testimony of Heston and Wright, who testified to similar conversations, but what we have already said disposes of the objection.

The appellees called one Mesker as a witness, who testified as to his acquaintance with the testator, and that during the last year of his life his health was failing very much; that his conversation shifted more than it did in former years, and that there was a change in him.

On cross-examination the appellants asked the witness this question: "Mr. Mesker, would you have taken a note from John C. Staser during the last year of his life? Did you ever hear anybody in his life question his sanity?"

The court sustained an objection to these questions. We do not think the court erred in this ruling. We are unable to perceive how it could be material what the witness would or would not have done, or how the opinions of others, not under oath, as to the sanity or insanity of the testator could be admissible in evidence.

The appellees were permitted to prove by Mrs. Yeager, who is the stepmother of three of the testator's grandchildren, who were disinherited by the will in controversy, that the deceased always greeted and treated her as nicely as any one could treat a daughter.

Under the issues in this cause, it was not improper to prove the relations that existed between the testator and his family, that is, whether they were friendly or otherwise. We do not think the court erred in admitting this testimony.

The appellees called Mrs. Anna Stockfleth, who is a devisee under the will of the deceased, and one of his heirs, and, over the objection of the appellants, proved by her substantially the manner in which the family of the deceased live together; that the deceased farmed and practiced law; that he loaned money in both large and small amounts until

Staser et al. v. Hogan et al.

some time before his death ; that the last year of his life he did not attend to his own business, but that most of his business was transacted by his son Clinton ; the last year of his life he seemed childish, and was guilty of conduct, and held conversations, which indicated that his mind was failing, and that Clinton Staser was not on friendly terms with his sister, Mrs. Hogan.

We think that this witness was competent as to all matters appearing in her testimony. *Lamb v. Lamb, supra.*

If she was competent to give an opinion as to the mental condition of the testator, she was competent to give a statement of all she knew about him both before and after it is claimed that his mind failed, together with what he did and said, and the change, if any, in his manner, with a view of enabling the jury to weigh such opinion when given ; indeed, without such statement she could not be permitted to give her opinion.

Mrs. Aiken, over the objection of the appellants, was permitted to testify to a conversation between herself, the testator, and his son Clinton in the year 1879. The conversation tended to show that the memory of the deceased was at that time failing, and that the son had great influence over his conduct. The objection urged is, that this evidence is too remote. It was proper to show the condition of the testator's mind at any time, to enable the jury to determine its condition at the date of the will. It was also proper to show what influence, if any, the son had over the testator, under the issue that the will was procured by undue influence.

The appellants called one Litchfield, a justice of the peace, and proved by him that in the year 1885 the testator conducted the trial of a cause before him, and then offered to prove by him that the deceased managed the case "well and shrewdly." The court refused to permit this evidence, and in this we think there was no error. It called for the mere opinion of the witness. The witness was allowed to detail all that the deceased did in the management of the cause, and

Staser et al. v. Hogan et al.

to give his opinion as to the condition of the testator's mind at that time. This was all the appellants were entitled to.

The appellants called Franklin Staser as a witness in their behalf, and after they had examined him in chief, the appellees, while he was on cross-examination, for the purpose of impeaching his testimony, propounded to him the following questions: "In the spring or summer before your father died, the spring of 1885, at or near the station where your father lived, on the E. & T. H. R. R., in Vanderburgh county, if you did not say to Jake Clouder, in a talk about a ditch that was being dug on the place there, called the 'Singer ditch,' and in talking about your father's action and conduct about that ditch, say, 'Pay no attention to the old man; he is old and childish?'"

After having fixed the time, place, and conversation this question was also asked the witness: "Did you not say to Fred, 'I have got to leave home,' and did not Fred ask you, 'Why, what is the matter?' and did you not say, 'It is owing to pa; he is going crazy, from what I saw this morning,' and Fred asked you, 'Why, what is it?' and you said, 'I saw pa in Kate's room; I caught him at it; he pointed his finger at me and said, "I will fix you for this."' Did you say that to your brother Fred?"

The witness answered each of these questions in the negative, and the appellees were permitted, by way of impeachment, to show that he did make the statements attributed to him. It is urged that the matter thus called out did not tend to contradict any matter to which the witness had testified in chief, and that, therefore, the court erred in admitting it, but in this we think the appellants are in error. The witness, in his examination in chief, had testified to his intimate relations with the testator, and had given a detailed account of his conduct, business habits, and conversation, and had concluded by stating that in his opinion the testator was a person of sound mind. His statements out of court that the testator was childish, and that he was going crazy, were in

Staser et al. v. Hogan et al.

conflict with his evidence in court, to the effect that the testator was of sound mind. We do not think the court erred in admitting this evidence.

Clinton Staser was called as a witness for the appellants, and after his examination in chief, and while on cross-examination, the appellees propounded to him this question: "Before your father's death, if in the latter part of September, 1885, in a buggy, on the way to the homestead with your sister Anna, in Vanderburgh county, if you didn't say to your sister Anna, 'I tell you, Kate Hogan is going to make trouble in our family some day. I know I will be left to settle pa's business, and I don't want to have any trouble with her. I am going to have a talk with him, and whatever he wants to leave to the Catholic church I am going to have him set apart to her.'"

The witness denying the statement attributed to him, the appellees were permitted to prove that he did make such statement.

It is contended by the appellants that this related to a collateral matter in nowise connected with the witness's testimony in chief, and that the court erred in admitting it.

It is further contended that the witness could not have been asked the question here put, in his examination in chief, because undue influence can not be proved by the declarations of one of the devisees, and we are referred to the cases of *Hayes v. Burkam*, 67 Ind. 359, and *Ryman v. Crawford*, 86 Ind. 262.

On the other hand, it is contended by the appellees that the question was asked, and was admissible, for the purpose of showing that there was ill-will between the witness and Mrs. Hogan.

Mrs. Hogan was one of the plaintiffs in the case, and was deeply interested in setting aside the will in controversy, she being entitled under the will to a very small sum as compared with what she would receive if the will were set aside. It appears that the testator was bitterly opposed to her mar-

Staser et al. v. Hogan et al.

riage, and one of the reasons urged for such opposition was that her husband was a Catholic. It is contended by the appellees that the idea which the witness intended to convey by the remark attributed to him was, that he intended to induce his father to disinherit Mrs. Hogan.

The general rule of law is, that when a witness is cross-examined on matters collateral to the issues, his answer can not be subsequently contradicted by the party putting the question. The test of whether a fact inquired of on cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? *Welch v. State*, 104 Ind. 347; *City of South Bend v. Hardy*, 98 Ind. 577. This rule, however, has no application where it is sought to show that the witness has an interest in the case, or that he is hostile to one of the parties to the suit, and if, on such cross-examination, the witness denies such hostility he may be contradicted by his own statements or acts. *Scott v. State*, 64 Ind. 400; *Johnson v. Wiley*, 74 Ind. 233; *Stone v. State, ex rel.*, 97 Ind. 345; Wharton Crim. Ev., section 484; Roscoe Crim. Ev. 102; *Newton v. Harris*, 6 N. Y. 345.

In our opinion, this evidence was admissible for the purpose of showing the hostility of the witness to Mrs. Hogan, one of the parties to the suit. Other declarations of this witness were admitted in evidence for the same purpose, but what we have said disposes of the objection thereto, and to other objections in the record of like character.

During the argument of the cause, and while making the closing argument, G. V. Menzies, one of the counsel for the appellees, read to the court in the presence of the jury the following extract from *Bowman v. Phillips*, 47 Ind. 341: "It may be conceded, that a man with a sound mind may dispose of his property as he pleases; but if he does so in violation of all nature's laws, justice, and humanity, juries and courts will resort even to technicalities to prevent a great wrong." Before reading, said Menzies said to the

Staser et al. v. Hogan et al.

jury: "I want you to listen to what the Supreme Court has said in a case like this," and after reading he turned and repeated the language above quoted to the jury, and then said: "But the plaintiffs have abundance of evidence to set this will aside."

Before reading the above extract, the appellants objected to counsel's reading law to the jury, and the court sustained the objection, but decided that said counsel might read to the court from the decision of the Supreme Court, and announced that the court would give the law to the jury.

Afterwards the said Menzies, in the course of his argument, said he would read to the jury instruction No. 7, which had been asked for by the defendants, and which was marked as given, and which was in fact given by the court to the jury. He then read instruction No. 7, as follows:

"No. 7. A will can not be impeached because of injustice in a moral sense. If the testator be of sound mind, he may, from caprice, causeless malice, or foolish prejudice, cut off his children and give his property to strangers, or give his property to some of his children to the exclusion of others. The moral injustice or caprice in such cases may be considered as a circumstance on the question of insanity, but if from the evidence it be clear that the testator was sane, the caprice or injustice is of no moment whatever. The testator, unless of unsound mind, must be allowed to make his own division and distribution of his property."

After reading said instruction he said to the jury: "This is the law, and the court will give it to you as the law in the case, but it is on the border-land of the law. His Honor from the bench despises it. It is a relic of barbarism, and ought to be expunged from the law of the land."

During this comment, counsel for the defendants interrupted counsel for plaintiffs for thus commenting upon this instruction, whereupon the court said to Major Menzies, in the presence of the jury: "You admit that this instruction is the law in the case?" to which counsel for plaintiffs re-

Staser et al. v. Hogan et al.

sponded, in the presence of the jury: "Yes, it is the law in the case; your Honor has the right to give it to the jury, and I have no fault to find with your Honor for giving it."

Thereupon counsel for the plaintiffs proceeded with his argument, and did not comment further upon the instruction, and no ruling was asked for or made by the court in reference to the matter.

It is clear, we think, that no question is presented for our consideration as to the conduct of counsel in commenting upon the instruction above set out. The court was not asked to take any action in the matter; no ruling was made and no exception reserved. It is now settled that in order to save any question in relation to the misconduct of counsel during the progress of the trial, the court must be called upon to correct the injury done; if the court refuses to do so the party injured may except, and thus save the question involved for the consideration of this court. If the court does all in its power to correct the injury, no question can be presented to this court unless the injured party moves to discharge the jury. *Grubb v. State*, 117 Ind. 277; *Kern v. Bridwell*, 119 Ind. 226; *Coleman v. State*, 111 Ind. 563; *Henning v. State*, 106 Ind. 386.

As the court may at any time before the jury retires add to the instruction prepared and settled, it must have the power to hear argument upon legal questions, and hear authorities. As to when and as to the extent to which such argument shall be had, must, of necessity, depend upon the discretion of the court.

Unless it appears that such discretion has been abused, and that the party complaining has been injured, the cause should not be reversed on account of the exercise of such discretion.

We do not think it so appears in this case.

The instructions are quite lengthy, and no good purpose would be subserved by setting them out. They cover every phase of the case, and, when taken as a whole, fairly state the law as applicable to the case as made by the evidence.

Staser et al. v. Hogan et al.

It is true, that the first instruction given on behalf of the appellees is somewhat obscure, but when taken in connection with the other instructions we do not think the jury could have been misled thereby.

We think that the essential elements of the law contained in the instructions asked by the appellants, and refused by the court, so far as they state the law correctly, are contained in the instructions given. Under such circumstances the cause will not be reversed for refusal to give the instructions asked. *Garfield v. State*, 74 Ind. 60; *Barnett v. State*, 100 Ind. 171; *Everson v. Seller*, 105 Ind. 266.

At the term of court at which this case was tried, the regular judge, not being able to attend, appointed Hon. R. D. Richardson to hold the court in his stead. The verdict of the jury was returned on the last day of the term, and on the first day of the next term the motion for a new trial was filed. The regular judge was present at the meeting of the court at which the motion for a new trial was filed, but over the objection of the appellants he declined to hear the motion, and the said R. D. Richardson heard and disposed of the same over the objection and exceptions of the appellants.

It is contended by the appellants that the authority of the Hon. R. D. Richardson to act in the case ceased with the term at which it was tried, and that his action in overruling the motion for a new trial and rendering judgment on the verdict was without authority and void.

On the other hand, it is contended by the appellees that the said Richardson having once acquired jurisdiction to hear and dispose of the case, retained such jurisdiction until the cause was finally disposed of.

It must be manifest to every one that the regular judge could not intelligently hear and dispose of the motion for a new trial in this cause. No bill of exceptions containing the evidence, or setting forth the rulings of the special judge, had been prepared and signed, so that the regular judge would be

Staser et al. v. Hogan et al.

unable to determine whether the evidence supported the verdict, or whether the party claiming the new trial had been able to secure a fair and impartial trial of his cause. Prior to the statutes of 1881 the law required motions for a new trial to be filed at the term at which the cause was tried, so that no difficulty of the kind here involved could arise, for the special judge could compel a final disposition of the cause at that term. Now, however, where the verdict is returned on the last day of the term, the motion for a new trial may be filed on the first day of the next succeeding term.

Under the old practice it was held that the authority of a special judge terminated with the term at which he was appointed. *Greenup v. Crooks*, 50 Ind. 410.

It was held, however, that a special judge might give time and sign a bill of exceptions after the close of the term at which he was appointed. *Lerch v. Emmett*, 44 Ind. 331.

It is said in this case that the special judge had all the power over it that the regular judge would have had, had he not been disqualified to hear it.

In the case of *Beitman v. Hopkins*, 109 Ind. 177, it was held that the special judge might sign the record at a term subsequent to that at which he was appointed. In that case it was said by the court: "We think, however, that under section 415, R. S. 1881, the special judge had authority to pass upon appellant's motion, and to sign the record at the time he did. The statute, it will be observed, is an enlargement upon prior statutes, and was intended to clothe special judges with authority to act in cases in which they are called to preside, until the final judgment is rendered, entered up, and signed."

We think that where parties voluntarily consent to try their cause before a special judge they should be held as consenting to his making a final disposition of the same; for in the very nature of things no one else can intelligently dispose of it. We think that in such a case the provisions of

Staser et al. v. Hogan et al.

section 415, R. S. 1881, should be held to apply, without regard to the reason for appointment.

We have been urged to pass upon the question as to whether the bill of exceptions is in the record, but as we find no error in the record for which the cause should be reversed, treating the bill as part of the record, we deem it unnecessary to pass upon that question.

Judgment affirmed.

Filed June 8, 1889.

ON PETITION FOR A REHEARING.

COFFEY, J.—An earnest petition, supported by an able brief, has been filed in this cause praying for a rehearing.

In view of the importance of the case, and of the numerous questions involved in it, we have again gone carefully over the voluminous record in the cause, and find no reason for changing our opinion upon any of the questions decided in the original opinion.

It is claimed, however, that there are some questions involved in the case which were not decided in the opinion heretofore handed down. It is earnestly argued that there is a total failure of evidence to establish the charge of undue influence. We did not, when considering the case originally, nor do we now, deem it necessary to pass upon that question in determining whether or not the evidence supports the verdict. The complaint charges both mental incapacity and undue influence. The evidence tends to support the charge of mental incapacity, and as the verdict is general it will withstand an attack upon the ground that it is not supported by the evidence.

It is claimed also that the third instruction given by the court, at the request of the appellees, is erroneous and must have misled the jury. This instruction, as it comes to us, is somewhat obscure, but we can not place upon it the construction claimed by the appellants. There is evidently the

Staser et al. v. Hogan et al.

omission of some word or words, either in drafting the instruction or in making a copy of it. Without supplying such words the instruction is wholly without meaning. Supplying the words necessary to give the instruction any intelligent meaning, we understand it to inform the jury that, as a general rule, the symptoms of insanity are, in a degree, incapable of description, but are sometimes quite obvious. They may exist in such a subtle form as to elude the observation of the most experienced physician. Whether this be so, as also the belief in the existence of mere illusion or hallucinations, the creatures purely of the imagination, such as no sane man could believe in, are questions of fact, as well as the proper inference arising upon them, for the jury; and they may furnish unequivocal evidence of insanity. If they do, and enter into the execution of a will, it may be avoided for partial insanity of the testator. Even after supplying the words necessary to give this instruction meaning, it can not be said that it is free from criticism; but however this may be, the instruction attempts to announce a merely abstract principle of law, and when construed with the other instructions in the cause, there is no reasonable ground for the belief that it misled the jury.

At the proper time the appellants asked the court to give to the jury the following instruction: "The court instructs the jury that there is no evidence in this case conducing to show that the will in contest was procured by undue influence, and upon that issue they should find for the defendants."

In cases where the evidence for the plaintiff is of such a character as that, taking it as true, and giving to it all the inferences that may be legally drawn therefrom, it would not support a verdict in his favor, the court may direct the jury to return a verdict for the defendant. *McClaren v. Indianapolis, etc., R. R. Co.*, 83 Ind. 319; *Koerner v. State*, 98 Ind. 7.

But in this case it can not be said that there is no evidence,

Staser et al. v. Hogan et al.

either direct or circumstantial, tending to prove undue influence. There is some evidence tending in that direction, but whether it is sufficient to sustain a verdict upon the charge of undue influence we are not called upon in this connection to decide. The instruction under consideration required the court to tell the jury that there was no evidence conducing to prove undue influence. We think the court did right in refusing to say to the jury that there was no evidence tending to prove undue influence. Had the court been asked to instruct the jury that there was not sufficient evidence in the cause to prove the charge of undue influence, we would feel called upon to decide the question thus presented, but as no such instruction was asked the question does not arise.

A number of interrogatories was submitted to the jury by the appellants and answered. It is not claimed that the answers to these interrogatories are in conflict with the general verdict, but it is contended by the appellants that the answers to the interrogatories are not supported by the evidence. It is contended that such an open disregard of the evidence, in particular and material things, as is exhibited in this case, inexorably undermines the general verdict, and requires that it should be set aside as an unsupported verdict.

The object sought to be attained in putting interrogatories to the jury is to elicit from them special answers to questions of fact involved in the case, necessary to a correct application of the law to the facts in the case under investigation. For this reason, if the jury return answers to special interrogatories which disclose facts inconsistent with the general verdict, such answers will control the general verdict, and the court will render judgment according to the special facts found, notwithstanding such general verdict. If the jury should return a general verdict for one of the parties, and should answer interrogatories disclosing facts inconsistent with the verdict, it would then be necessary to inquire whether such answers were, or were not, supported by the

Staser et al. v. Hogan et al.

evidence. If it found that they were not supported by the evidence, as the court could not ignore such answers, it would undoubtedly be its duty to grant a new trial, as the ends of justice could be reached in no other way. *Murray v. Phillips*, 59 Ind. 56; *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471. But we have no such case here. The answers to special interrogatories are consistent with the general verdict of the jury. The motion is for a new trial, assigning as a reason that the verdict of the jury is not supported by the evidence. In such case the attention of the court is not called to the interrogatories and the answers thereto, but it is directed to the evidence in the cause. It is the duty of the court to examine the evidence, and if it supports the general verdict, the motion should be overruled, without any regard to the manner in which the answers to interrogatories are made.

In the case of *Ohio, etc., R. W. Co. v. Selby*, *supra*, the appellant moved for a new trial on the ground that the answers to interrogatories were not supported by the evidence, and this court said: "If the general and special verdicts are consistent with each other, then both should stand. If they are inconsistent, and the special verdict is not supported by the evidence, the appellee, and not the appellant, had the right to complain. * * * The general verdict includes all that is in the special finding."

In a case like this, where there is nothing in the record to indicate that the jury did not base its verdict upon the charge which the evidence tends to support, we think it wholly immaterial whether the answers to interrogatories addressed to another branch of the case are supported by the evidence or not supported. If the general verdict is supported by the evidence, in such case, the motion for a new trial, assigning for reason that the verdict is not so supported, should be overruled.

After a second examination of the record in this cause, and a careful consideration of all the questions involved, we feel

The State v. French.

warranted in re-affirming that there is no error in the record for which the judgment of the circuit court should be reversed.

Petition for a rehearing overruled.

Filed Nov. 5, 1889.

120	229
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No. 15,004.

120	229
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THE STATE v. FRENCH.

CRIMINAL LAW.—Trespass.—Unenclosed Land.—Under section 1941, R. S. 1881, it is trespass to enter upon the land of another after being forbidden, whether the land be enclosed or not.

SAME.—“Premises.”—Meaning of Word.—As the word “premises” means “lands and tenements,” an affidavit under section 1941 is not bad because such word is used instead of the word “land.”

SAME.—Affidavit for Trespass.—Description of Premises.—An affidavit for trespass under section 1941, is bad unless it contains some identification or description of the premises upon which it is alleged the offence was committed.

From the Sullivan Circuit Court.

L. T. Michener, Attorney General, *W. C. Hultz*, Prosecuting Attorney, *J. H. Gillett* and *O. B. Harris*, for the State.

W. S. Maple, *G. W. Buff* and *J. S. Bays*, for appellee.

ELLIOTT, C. J.—The charge against the appellee is made in the following language: “That on the 15th day of April, 1889, Henry French unlawfully entered upon the premises of John A. Cain, in Sullivan county, in the State of Indiana, after being forbidden to do so by him, the said John A. Cain.” The offence which the affidavit assumes to charge is that of trespass as defined by section 1941, R. S. 1881.

The State v. French.

There is no merit in the contention that the affidavit is insufficient because it does not state whether the premises were inclosed or uninclosed. There was no necessity for any statement on this point, for whether the premises were inclosed or not it was a misdemeanor to enter upon them after being forbidden.

It is contended with some force and plausibility that the charge is insufficiently made because the word "premises" is employed instead of the word land. In view of our statutory provisions upon the general subject, and of our decisions, we think the contention can not be permitted to prevail. One of these statutory provisions is as follows: "Words used in a statute to define a public offence need not be strictly pursued, but other words conveying the same meaning may be used." R. S. 1881, section 1737. The word "premises" is now commonly used to mean "lands and tenements." Possibly usage has corrupted the meaning of the word, but the authors of our law and other dictionaries say that one of the meanings of the word is that which we have given it.

We hold the affidavit insufficient, because the premises were not described. A person prosecuted for such a trespass as that here charged, has a right to be informed of the place upon which he is charged with having trespassed. Probably no great strictness is required in describing the premises, but there must be some description, and it should be sufficiently definite to enable the accused to know the precise charge he is called upon to meet.

Judgment affirmed.

Filed Sept. 24, 1889.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—We think the authorities cited by the State do not apply to such a case as this. We think that where there is a prosecution under the statute on which the affidavit is founded, there must be some identification or de-

Castor v. Davis et al.

scription of the property, otherwise if the person named as owner should own ten, or more, parcels of property, the defendant could not be informed which parcel it was that he was forbidden to enter. If prosecuted a second time, a defendant could not show by the record, as he ought to have a right to do, that there had been a former recovery or a former acquittal. There is a distinction between prosecutions under this statute and cases where permanent injury is done to the land.

Certainly, where, as here, the prosecutor employs such a loose and vague term as "premises," he should be required to give some general description of the premises.

Petition overruled.

Filed Nov. 2, 1889.

No. 13,846.

CASTOR v. DAVIS ET AL.

MARRIAGE.—Presumption of Validity.—Presumption of Continued Insanity.—

Where a man who has been adjudged of unsound mind afterwards marries a woman with whom he lives for more than thirty years in the relation of husband and wife, the presumption of continued insanity will not prevail as against the presumption in favor of the legality of the marriage.

From the Boone Circuit Court.

M. E. Clodfelter and *T. J. Cason*, for appellant.

R. W. Harrison and *B. S. Higgins*, for appellees.

COFFEY, J.—This was an action by the appellant against the appellees for the possession of the land described in the

Castor v. Davis & al.

complaint. The cause being at issue was submitted to the court for trial without the intervention of a jury. At the request of the appellant the court made a special finding of the facts in the cause, which finding is as follows :

"1st. That, on the 17th day of January, 1856, John Snavelly was the owner in fee simple of the real estate herein, viz., the south half of the northeast quarter of section 30, in township 20 north, of range 2 west, situate in Boone county, Indiana, and that on said last named date said John Snavelly, together with his wife Lucinda R. Snavelly, by deed, conveyed said real estate to Esther Blackburn.

"2d. That said Esther Blackburn and John, her husband, conveyed by warranty deed said real estate, June 10th, 1857, to Nathan Elliott.

"3d. That, on the 11th day of June, 1857, the said Nathan Elliott and wife conveyed by warranty deed said real estate to John Blackburn and Esther Blackburn, husband and wife.

"4th. That, on the 4th day of September, 1873, said John and Esther Blackburn conveyed by deed said real estate to Joseph Piles and Elizabeth Piles, husband and wife, in consideration of \$4,000, named in the deed.

"5th. That Joseph and Elizabeth Piles, on the 17th day of February, 1877, in consideration of \$4,000, named in the deed, conveyed said real estate to Daniel Rhodes.

"6th. That, on the 24th day of May, 1878, said real estate was recovered by a decree rendered in the Montgomery Circuit Court, the action having been commenced in Boone county, Indiana, and the venue thereof changed to Montgomery County, against said Rhodes and wife, and the title to said real estate recovered and quieted in Joseph Piles and Elizabeth Piles, and the deed to Rhodes held for naught.

"7th. That during the time the same was in the hands of said Rhodes, Rhodes and wife mortgaged said real estate to the Travellers Insurance Company for \$1,000, which mortgage was so executed on the 13th day of April, 1877.

Castor v. Davis et al.

" 8th. That, on the 19th day of October, 1881, said Joseph Piles and Elizabeth Piles conveyed by quitclaim deed said real estate to defendants Almond Davis and Mary E. Davis, his wife, in consideration of \$400 cash, the grantees to assume and pay all encumbrances, including the mortgage aforesaid; and they did pay off said mortgage, amounting to \$1,000, and \$1,400 cash for the same.

" 9th. That said John Blackburn departed this life on the 15th day of September, 1873, without child, children, father or mother, and that said Esther Blackburn departed this life on the 3d day of May, 1876, without issue, child or children, father or mother.

" 10th. On the 14th day of August, 1840, an inquisition was had in the probate court of Montgomery county, Indiana, regarding the sanity of the said John Blackburn, and he was adjudged by said court a person of unsound mind, and incapable of managing his estate, and one Hudson Middleton was appointed his guardian, who was discharged by said court on the — day of August, 1846; that the defendants Almond and Mary E. Davis had no notice or knowledge whatever at the time they took title for said real estate of the unsoundness of mind of said Blackburn, or of the existence of the record of the unsoundness of his mind until disclosed in the trial of this cause.

" 11th. That said John Blackburn and Esther Conrad were married about November, 1843, in Montgomery county, Indiana, and lived and cohabited together as such husband and wife, and went into society, and were accepted as such until the death of John Blackburn, as above stated.

" 12th. That said John Blackburn and Esther Blackburn moved from Montgomery county to Boone county, Indiana, about 1849 or 1850, and continued to live together in Boone county nearly the whole of said time, residing on said land, and were so living on the same at the time they departed this life.

" 13th. That the plaintiff, Amy Castor, is a sister of said

Castor v. Davis et al.

John Blackburn, deceased, and the following children of a deceased sister are living, viz., Tolina Cox, Hannah Grist, and William Smith.

"14th. That immediately preceding the commencement of this action the plaintiff demanded possession of the whole of said real estate, which was refused, and claimed by the defendants Almond Davis and Mary Davis.

Upon these facts the court stated, as conclusions of law, that the plaintiff had no right, title, or interest in the land described in the complaint, and was not entitled to the possession thereof, to which conclusions the appellant excepted, and assigns as error that the court erred in its conclusions of law upon the facts found.

The question upon which the case, in a measure, depends, is this: Was the marriage of John Blackburn void? If it were conceded that Esther Blackburn and John Blackburn were husband and wife, then the conveyance executed by Elliott to them vested in them an estate by entireties, and as she survived him it follows that the appellant can not recover in this action.

In the case of *Redden v. Baker*, 86 Ind. 191, it was held that where a person had once been adjudged insane by a proper tribunal, the presumption of insanity continued until such person had been declared sane under the proceeding provided for by our statute, and that while the record of insanity stood such person was incompetent to enter into any contract. Such is, undoubtedly, the rule where there are no counter presumptions, and where the question involved relates to ordinary business transactions in which the public has no interest.

But in cases like this, involving the legality of a marriage, every presumption is in favor of the legality of such marriage. The question, therefore, is, which is the stronger presumption, that of continued insanity for the period of thirty-three years, and consequent adultery, or that of restoration to sanity and legitimate cohabitation?

Castor v. Davis *et al.*

Mr. Bishop, in his work on Marriage and Divorce, vol. 1, section 457, says: "Every intendment of the law is in favor of matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs the law raises a strong presumption of its legality; not only casting the burden of proof on the party objecting, but requiring him throughout, and in every particular, plainly to make the fact appear, against the constant pressure of this presumption that it is illegal and void. So that it can not be tried like ordinary questions of fact, which are independent of this sort of presumption."

Following the rule here enunciated, it was held in the cases, *Greensborough v. Underhill*, 12 Vt. 604, *Harris v. Harris*, 8 Bradwell (Ill.) 57, *Dixon v. People*, 18 Mich. 84, and *Yates v. Houston*, 3 Texas, 433, that where the parties had entered into a second marriage the law would presume in favor of the validity of the second marriage, in absence of proof to the contrary, that the former consort was dead at the time of such second marriage.

So in the case of *Klein v. Laudman*, 29 Mo. 259, and *Hull v. Rawls*, 27 Miss. 471, where the parties had entered into a second marriage, it was held that the law would presume in favor of the legality of the second marriage, that the first marriage had been dissolved by a divorce, in the absence of some evidence to the contrary.

In the case of *Teter v. Teter*, 101 Ind. 129, where the parties intermarried at the time the husband had a living wife, who afterwards obtained a divorce from him, and the parties cohabited together after the granting of such divorce, it was held that the law would presume a good common-law marriage, the presumption being in favor of morality and not immorality, marriage and not concubinage, legitimacy and not bastardy. See, also, *Boulden v. McIntire*, 119 Ind. 574.

To sustain the claim of the appellant in this case, we are required to presume that John Blackburn and Esther Blackburn lived in adultery for the period of thirty years. In

Castor v. Davis et al.

view of the facts that they went into and were received and accepted in society as husband and wife during all that time, and engaged in the execution of deeds of conveyance, and were purchasing and selling real estate, we do not think we are authorized to indulge such a presumption. Whatever the presumption arising from the record made in 1840 may be when applied to ordinary contracts, we do not think it should be permitted to overcome the presumption in favor of the legality of a marriage where the parties lived together as husband and wife for more than a quarter of a century.

Marriage is something more than an ordinary contract affecting the property rights of the parties, it is an institution in which the public have an interest, and it may well be doubted as to whether the heirs of John Blackburn could be heard to question the legality of his marriage.

In the case of *Pence v. Aughe*, 101 Ind. 317, it was held that the guardian of an insane person could not maintain an action to annul a marriage with his ward. Such action can only be maintained by one of the parties to the marriage.

We do not think that the circuit court erred in its conclusions of law upon the facts found.

Judgment affirmed.

Filed Sept. 24, 1889; petition for a rehearing overruled Nov. 6, 1889.

Tomlinson *et al.* v. Peters *et al.*

No. 14,676.

TOMLINSON ET AL. v. PETERS ET AL.

APPEAL.—*County Commissioners.—Gravel Road Proceedings.—Final Order.*—

An appeal will not lie from an order of the board of county commissioners for the construction of a free gravel road, and appointing a committee to apportion the costs of construction upon the lands benefited; an appeal lies only from the final order confirming the report of the committee.

From the Jay Circuit Court.

D. T. Taylor, R. H. Hartford and W. H. Williamson, for appellants.

J. W. Headington, J. F. LaFollette, H. N. Headington and J. J. M. LaFollette, for appellees.

OLDS, J.—On the 27th day of February, 1882, the appellants, and others, filed in the auditor's office of Jay county, Indiana, a petition for a free gravel road in said county, described therein, and at the same time they filed a bond conditioned for the payment of the costs occasioned thereby, in case the improvement asked for should not be ordered by the board of commissioners. The bond was approved by the auditor of said county on March 2d, 1882. No action was taken by the board of commissioners until September, 1886, when a view and survey were ordered, and viewers and an engineer were appointed by the board to make the necessary view and survey. Various steps were taken, additional petitions were filed, and petitioners asked that their names and land owned by them be counted in favor of the road, and others withdrew from the petition; and after these various steps had been taken in the case, on the 22d day of December, 1886, the board of commissioners made a finding that the papers were regular, and that the petition was signed by a majority of the resident land owners whose lands were reported as

120	237
123	473
130	287
136	171
120	237
131	336
130	237
134	701
130	237
143	522
120	237
1153	259

Tomlinson *et al.* v. Peters *et al.*

benefited and ought to be assessed, and also by those owning a majority of all the acres of land reported as benefited and ought to be assessed; and, also, that the improvement would be of public utility, and made an order that the road be constructed, and appointed a committee of three persons to apportion the costs of construction. From this order of the board of commissioners an appeal was taken in this cause to the circuit court. A motion was made by the appellants, in the circuit court, to dismiss the appeal, which motion was overruled, and the ruling excepted to by the appellants and the exception properly reserved by bill of exceptions; and the ruling is assigned as error.

The question presented by the ruling is as to whether or not an appeal will lie from this order of the board of commissioners. If it will not, then the motion should have been sustained, and the appeal dismissed. The statute evidently does not contemplate more than one appeal in any case, and that must be from the final decision and judgment in the case. The proceedings remain under the jurisdiction of the board of commissioners, and they have power to change or annul any order made by them until a decision is made substantially ending and terminating the proceedings before the board. *Freshour v. Logansport, etc., Turnpike Co.*, 104 Ind. 463.

In the proceedings for the construction of gravel roads, the commissioners order the construction of the road, but the road cannot be constructed without the further final action and decision of the board confirming the report of the three freeholders appointed to estimate the expense of the improvement upon the real property, which shall, when so approved and spread upon the record, be a lien on the real property; and until such order and decision is made by the board, the proceedings remain under the jurisdiction of said board of commissioners, and an appeal only lies from such final order. This construction of the statute is sustained by

Essig v. Lower et al.

the case of *Neptune v. Taylor*, 108 Ind. 459, and authorities cited in that case, and *McKee v. Gould*, 108 Ind. 107.

It follows, therefore, that the court erred in overruling the motion to dismiss the appeal.

There are other errors assigned, but as the decision of this question disposes of the case it is unnecessary to pass upon them.

Judgment reversed, at costs of appellees, with instructions to the court below to sustain the motion to dismiss the appeal.

Filed June 8, 1889; petition for a rehearing overruled Nov. 8, 1889.

No. 13,782.

ESSIG v. LOWER ET AL.

JUDGMENT.—*Collateral Attack.*—A judgment is only subject to collateral attack when it is void.

SAME.—*Jurisdiction.*—*Notice by Publication.*—*Affidavit.*—*Sufficiency of.*—Where notice is given by publication, the judgment of the court that the publication and the affidavit upon which it is based are sufficient to give it jurisdiction is conclusive upon all the parties, as against a collateral attack.

SAME.—*Judgment before Notice is Completed.*—A judgment rendered upon notice by publication, before the notice has run the full period prescribed by the statute, is not void, although erroneous, and not subject to collateral attack.

SAME.—*Quieting Title.*—*Removal of Encumbrances.*—*Notice by Publication.*—Under section 318, R. S. 1881, a decree to quiet title to real estate and to remove therefrom apparent liens, may be rendered upon notice by publication.

From the Elkhart Circuit Court.

190	239
194	238
197	201
190	239
199	147
120	239
130	520
130	527
120	239
137	690
120	239
143	484

Essig v. Lower et al.

H. C. Dodge, R. M. Johnson and E. G. Herr, for appellant.

H. D. Wilson, W. J. Davis, J. H. Baker and F. E. Baker, for appellees.

COFFEY, J.—This action was brought by the appellant against the appellees, in the Elkhart Circuit Court, to set aside certain judgments and decrees set out in the complaint, and to be permitted to redeem from a certain mortgage lien upon the real estate described in the complaint. At the request of the parties, the court made a special finding of the facts in the cause, and stated its conclusions of law thereon.

From the facts found by the court, it appears that in the year 1867 Michael B. Snider was the owner in fee, and in the possession, of lots 200, 201, 202, 203, 204, and 205 in the original plat of the city of Goshen, Indiana, and on the 12th day of April of that year mortgaged the same to the appellant to secure the sum of \$2,999, which mortgage was duly recorded.

At the September term, 1869, of the Elkhart Common Pleas Court, the appellant recovered judgment on said debt against the said Snider for the sum of \$3,614.76, and a foreclosure of said mortgage, which is yet unpaid.

On the 14th day of August, 1852, Gottlieb Schaubel, who was then the owner of the same, mortgaged said lots 203, 204, and 205 to Henry Pierce, to secure three promissory notes, one of which was payable to Mary McNaughten, which mortgage was duly recorded.

At the March term, 1870, of the Elkhart Circuit Court, Henry P. McNaughten and — Jackson recovered a judgment on the note so executed to the said Mary McNaughten for the sum of \$237, and a decree foreclosing the mortgage given to secure the same, to which decree of foreclosure the appellant was a party defendant.

At the time of said foreclosure the appellant was a non-resident of the State of Indiana, and was notified of the

Essig v. Lower et al.

pendency of said suit by publication only, which publication was issued upon the following affidavit: "Christian Conrad, being duly sworn, upon his oath, says that the plaintiffs in the above entitled cause of action have a good cause of action against the defendants for a foreclosure of mortgage, and that Elias Essig (and others, naming them), are, as he verily believes, non-residents of the State of Indiana," which affidavit was properly entitled.

At the time of the rendition of this judgment and decree, the defendants in this case, Christian Conrad and Daniel Lower, were junior encumbrancers on said lots 203, 204, and 205, and as such, on the 19th day of May, 1870, redeemed from the same and took an assignment thereof. Said lots were sold on the 11th day of June, 1870, by the sheriff of Elkhart county on said decree, and bid in by the said Conrad and Lower, and they subsequently procured a sheriff's deed therefor.

On the 16th day of October, 1858, the said Gottlieb Schaubel, still being the owner of said lots 202, 203, 204, and 205, mortgaged the same to Scott, Sell & Co., who assigned said mortgage to Elias Purl.

On the 28th day of September, 1869, said Purl recovered judgment on said mortgage in the Elkhart Circuit Court for the sum of \$548, and a decree foreclosing the same, but the appellant was not a party thereto. Said lots 202 and 203 were sold on a certified copy of said decree, and bid in by Matthew Osborn for \$608.93.

Said Gottlieb Schaubel also mortgaged said lots 202, 203, 204, and 205 on the 24th day of January, 1859, to said Scott, Sell & Co. to secure \$500, and they assigned the same to said Elias Purl, who recovered a judgment thereon in the Elkhart Circuit Court on the 28th day of September, 1859, for \$133.19, to which proceeding the appellant was not a party. On a certified copy of said decree the said Osborn bid in said lots 204 and 205 for the sum of \$183.

Essig v. Lower et al.

On the 26th day of November, 1869, said Osborn sold said lots to Elias Purl, and on the 26th day of January, 1870, said Purl sold said lots 202, 203, 204, and 205 to the appellees, Christian Conrad and Daniel Lower, who took possession under their deed.

On the 13th day of January, 1865, Michael B. Snider, being the owner of the undivided one-half of said lots 200 and 201, mortgaged the same to Frank Layman, who assigned said mortgage to James McReynolds. In the year 1874 said McReynolds foreclosed said mortgage in the Elkhart Circuit Court, bid in said lots on a certified copy of said decree, took a certificate of purchase therefor, and assigned the same to the said Christian Conrad and Daniel Lower. The appellant was not a party to this foreclosure.

At the March term, 1870, of the Elkhart Circuit Court, the appellees, Christian Conrad and Daniel Lower, brought suit therein against the appellant and others to quiet their title to said lots 200, 201, 202, 203, 204, and 205, alleging in their complaint that they were the owners in fee of said lots, and that the defendants in said action claimed some interest in or title to said premises by reason of junior encumbrances having been put upon the same since the execution of the mortgages by and through which the said plaintiffs claimed title; that the claim of said title or interest so made by the defendants greatly damaged plaintiffs, rendered their title and right of possession insecure, and materially decreased the value of said premises. Prayer, that said defendants be summoned to appear and show cause, if any they had, why all their rights, title, and interest in and to said lands, if any existed, should not be forever barred and foreclosed, and the said encumbrances removed from said land, and for all proper relief.

The appellant at the time of the commencement of said suit was a non-resident of the State of Indiana, and was notified of the pendency of said suit by publication, which

Essig v. Lower et al.

notice of non-residence was issued upon the following affidavit, to wit:

"Charles B. Alderman, being duly sworn upon his oath, says that the plaintiffs in the above entitled cause of action, have a good cause of action against the defendants for the removal of encumbrances, and for equitable relief, and that said defendants, Elias Essig (and others, naming them), are, as he verily believes, non-residents of the State of Indiana."

The affidavit was properly entitled, and subscribed and sworn to.

Upon proper proof of publication, the Elkhart Circuit Court assumed jurisdiction of said cause, and the appellant failing to appear was defaulted; and such other proceedings were had in said cause as that said court entered a decree quieting title to said lots as against the appellant, which decree still remains in force.

On the 31st day of January, 1871, Christian Conrad and Daniel Lower conveyed said property to Emanuel Smiley and David Conrad, and put them in possession. In July, 1876, said Smiley and Conrad conveyed said property to Peter Conrad, and put him in possession. In the year 1878 the said Peter Conrad conveyed said property to the present owners, appellees herein. This action was commenced on the 23d day of August, 1881.

In the year 1876, and succeeding years, the appellees Kolb & Gross and Hattel & Hattel, in good faith, erected extensive and costly shops and ware-rooms on lots 201 and 204, at a total cost to them of \$19,300.

The court stated as conclusions of law, from the foregoing facts, that by the decree of foreclosure in the action for the foreclosure of the McNaughten mortgage, the equity of redemption of the plaintiff in lots 203, 204, and 205 was foreclosed, and that by the decree in the action brought by Conrad to quiet title, the plaintiff's equity of redemption was foreclosed and the lien of his mortgage was removed from lots 200, 201, 202, 203, 204, and 205, and the title of

Essig v. Lower et al.

the defendants was quieted, as against the plaintiff, in and to all of said lots, and found that the plaintiff was not entitled to the relief sought by him in this action. The court thereupon rendered judgment against the appellant for costs.

He assigns as error: 1st. That the court erred in its conclusions of law upon the facts found. 2d. That the court erred in overruling the motion of appellant for a new trial.

The only matter urged under the second assignment of error, is that the special finding is not supported by the evidence, but the evidence, we think, fully warrants the finding.

It is earnestly urged that the judgments and decrees referred to in the special finding are void, for the reason that the court rendering the same did not have jurisdiction of the person of the appellant. It is claimed that the affidavits upon which the publication was made, are wholly insufficient to warrant the issuing of publication, and, therefore, the publication was void.

This is a collateral attack upon these decrees, and unless they are wholly void the attack must fail though they may be erroneous. Had the court proceeded in these cases without any notice, then it would be clear that there was a want of jurisdiction, but it clearly appears, by the special finding, that there was *some* notice, and that such notice was based upon an affidavit. It became, therefore, a question to be determined by the courts in which these proceedings were pending as to whether such affidavits and notices were sufficient. The court having determined that question in favor of jurisdiction, such determination is conclusive as to all the parties when collaterally attacked. In the case of *Jackson v. State, etc.*, 104 Ind. 516, ELLIOTT, J., who wrote the opinion and collected the authorities upon this subject, after citing them, says: "These cases proceed on the theory that the court has authority to decide all questions, whether affecting the jurisdiction or other matters, and this is the only logical ground upon which they can be maintained. If it be conceded that

Essig v. Lower *et al.*

the court does not by its decision determine the sufficiency of a notice, then it must also be conceded that these cases are wrongly decided, and this would result in the overthrow of a long and unwavering line of decisions. Once it is granted that these decisions are sound, then the conclusion that the court may settle jurisdictional questions is inevitable. Of course, this rule can not apply where there is no jurisdiction of the subject-matter, or where there is no notice or summons, but it does apply in all cases where there is some notice, or some writ and service, although defective."

We are of the opinion that the appellant is precluded, by the judgment of the court, from calling in question the sufficiency of the publications, and the affidavits upon which they were based, in the causes referred in the special finding. *Quarl v. Abbett*, 102 Ind. 233; *Brown v. Goble*, 97 Ind. 86; *City of Terre Haute v. Beach*, 96 Ind. 143; *McCormick v. Webster*, 89 Ind. 105; *Million v. Board, etc.*, 89 Ind. 5; *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Stout v. Woods*, 79 Ind. 108; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Muncey v. Joest*, 74 Ind. 409; *Field v. Malone*, 102 Ind. 251; *Carrico v. Tarwater*, 103 Ind. 86.

It is also urged that as only forty-three days intervened between the date of the first publication in the action to quiet title and the rendition of judgment, therefore, the decree is void. In consideration of the time fixed for holding the circuit court in Elkhart county, the date of the rendition of the decree in that case is perhaps wrongly stated in the special finding, but, conceding that the special finding states the date correctly, we do not think the decree is void. It has often been held that a judgment rendered before the return day of process by a court of competent jurisdiction is not void, though it may be erroneous, and that such judgment can not be attacked collaterally. *Bonsall v. Issett*, 14 Iowa, 309; *Dutton v. Hobson*, 7 Kan. 196; *Shea v. Quintin*, 30 Iowa, 58; *Darrah v. Watson*, 36 Iowa, 116; *Christian*

Essig v. Lower *et al.*

v. *O'Neal*, 46 Miss. 669; *Cole v. Butler*, 43 Maine, 401; *Hendrick v. Whittemore*, 105 Mass. 23; *Helphenstine v. Vincennes Nat'l Bank*, 65 Ind. 582; *McAlpine v. Sweetser*, *supra*.

It is claimed that these cases have no application to a case where the notice is by publication, and the argument is, that notice by publication was unknown to the common law, and that when such notice is given the court can not acquire jurisdiction over the person until the notice has run the full statutory period. This claim has, however, been determined by this court adversely to the appellant. *Jackson v. State, etc.*, 104 Ind. 516; *Quarl v. Abbett*, *supra*. See, also, *Morrow v. Weed*, 4 Iowa, 77; *Bonsall v. Isett*, *supra*; *Ballinger v. Tarbell*, 16 Iowa, 491.

In the case of *Quarl v. Abbett*, *supra*, ELLIOTT, J., said: "The rule with respect to notice by publication is the same as to notice by service of summons; there is, indeed, reason for being more liberal in cases of constructive notice than in cases where the service is by summons, for the defendant in the former class of cases is entitled, as of right, to open the judgment and try the cause. It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law." 3 Blackstone Com. 283, 444; *Hahn v. Kelly*, 34 Cal. 391.

It is also argued that the decree in the action to quiet title, set forth in the special finding, is *in personam*, and not *in rem*, and that the court had no power to render such a decree on publication.

While it may be true that such decree is not *in rem*, strictly speaking, yet it must be conceded that it fixed and settled the title to the land then in controversy, and to that extent partakes of the nature of a judgment *in rem*. But we do not deem it necessary to a decision of this case to determine whether the decree is *in personam* or *in rem*. The action was to quiet the title to the land then involved, and to remove therefrom certain apparent liens. Section 318, R. S. 1881,

Hartlep *et al.* v. Cole.

expressly authorizes the rendition of such a decree on publication.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

MITCHELL, J., took no part in this decision.

Filed June 22, 1889; petition for a rehearing overruled Nov. 8, 1889.

No. 13,091.

HARTLEP ET AL. v. COLE.

120	247
142	447

PLEADING.—*Complaint upon Replevin and Appeal Bonds.*—For a complaint counting in separate paragraphs upon a replevin bond and upon an appeal bond, which is held to be good, see opinion.

120	247
1170	289

REPLEVIN BOND.—*Technical Defects.*—*Estoppel.*—The obligors in a replevin bond, under which the possession of the property in controversy has been obtained, are estopped, in an action on the bond for a failure to comply with an adverse judgment of the court, to set up as a defence that the statutory provisions relating to the execution of the bond were not technically complied with.

SAME.—*Acceptance and Approval of Bond.*—Where a replevin bond is delivered to the sheriff, and he, acting upon such delivery, places the property in the possession of the principal obligor, this constitutes an acceptance and approval of the bond.

SAME.—*Action upon Bond.*—*Subsequent Issuing of Execution.*—In an action upon a replevin bond, the fact that the plaintiff, after the beginning of the action, causes an execution to be issued upon the judgment rendered in the replevin proceeding, and also upon the judgment under which the property was seized prior to the institution of the replevin proceeding by the defendant, does not constitute a defence.

APPEAL BOND.—*Term-Time Appeal.*—*Approval of Bond.*—Where an appeal is taken in term, and the court fixes the amount of the bond required,

Hartlep *et al.* v. Cole.

approves the surety named and designates the time within which the bond must be filed, this constitutes an approval of the bond by the court, and an approval by the clerk is not necessary.

SPECIAL FINDING.—*Time of Requesting.*—*Discretion of Court.*—If the request for a special finding is not made at the commencement of the trial, the right thereto is waived, and thereafter it is a matter within the sound discretion of the court whether or not it will make a special finding.

From the Warren Circuit Court.

J. McCabe and *E. F. McCabe*, for appellants.

J. W. Cole, for appellee.

BERKSHIRE, J.—The appellee was the plaintiff below. The complaint was in two paragraphs. The first counted upon a written undertaking executed by the appellants to obtain the possession of personal property in an action of replevin. The second counted upon an appeal bond executed by the appellants for the purpose of perfecting an appeal taken in term by the appellant Hartlep from a judgment rendered against him by the Warren Circuit Court.

The appellants answered in two paragraphs, which were demurred to. The demurrers were sustained and exceptions taken.

The appellants then filed two additional paragraphs of answer, the first of which was the general denial. To the second paragraph the appellee filed a reply in general denial. There was a trial by the court, a general finding for the appellee, and, over a motion for a new trial, judgment was given for the appellee. To the overruling of their motion for a new trial the appellants excepted.

The several errors assigned are, in substance, as follows: 1. The court erred in sustaining the demurrer to the first paragraph of answer. 2. The court erred in sustaining the demurrer to the second paragraph of answer. 3. The court erred in sustaining the demurrer to the answer. 4. The court erred in overruling the motion for a new trial. 5. The court erred in sustaining the appellee's demurrer to the appellants' answer to the complaint. 6. The complaint does

Hartlep et al. v. Cole.

not state facts sufficient to constitute a cause of action. 7. The court erred in refusing to make a special finding.

The first paragraph of the complaint alleged that, on the 9th day of July, 1883, the appellant Hartlep filed in the clerk's office of Warren county his complaint and affidavit by which he sought to recover from the appellee certain personal property therein described, and that the clerk of said court on that day issued a writ directing the sheriff of Warren county to take said property from the appellee and deliver it to the appellant Hartlep upon his giving the written undertaking required by law, and on the same day the said sheriff executed said writ by taking from the appellee the said property and delivering it to the appellant Hartlep, and upon the delivery of said property the sheriff accepted the said written undertaking of the appellants, which they then and there executed and delivered to him; that by the terms of the said undertaking the appellants undertook and bound themselves, among other things, that the appellant Hartlep should return to the appellee the said property if return should be awarded, and to pay all such sums as the appellee should recover in said action; and the appellee avers that such proceedings were had in said action that at the January term, 1884, of said court, by the consideration and judgment thereof, it was adjudged that the appellant Hartlep return said property to the appellee, and that he recover of the said appellant his costs and charges laid out and expended, amounting to \$100, which are still due and unpaid; that the said judgment is still in full force, and that the appellants have failed and refused to return said property, or pay said costs upon request so to do.

The second paragraph of the complaint alleged that the appellee recovered a judgment against the appellant Hartlep for the recovery of one bay mare of the value of \$125, then in said appellant's possession, and a judgment for his costs in said action; that the appellant Hartlep was granted an appeal to the Supreme Court from said judgment upon condi-

Hartlep et al. v. Cole.

tion of his filing a bond in the sum of \$200, with his co-appellant as surety, within thirty days from the date of said judgment, which bond was duly filed on the 31st day of January, 1884, with the clerk of the Warren Circuit Court, and which bond was duly approved by the clerk ; that, by the terms of said bond, the appellants bound themselves in the penal sum of \$200 that the appellant Hartlep would duly prosecute his said appeal to effect, and abide by and pay the judgment and costs that might be adjudged against him ; and that, on the 25th day of April, 1885, this court affirmed the said judgment in all things against said appellant, which judgment is now in full force and effect ; that the appellants have failed and refused to return said property, or pay therefor, and have failed to perform and satisfy said judgment. Copies of the obligations sued on are filed with the complaint as required by the statute.

We can see no valid objection to either paragraph of the complaint.

It is too late for the appellants, after having executed the replevin bond and obtained possession of the property, after the court has rendered judgment awarding the property to the appellee, and after a failure to comply with the order of the court or pay the judgment, to set up as a defence to the action that the statutory provisions in regard to the execution of the bond were not technically complied with ; the law of estoppel will not allow such an unconscionable defence. But the bond having been delivered to the sheriff, and he, acting upon such delivery, having turned the property over to the appellant Hartlep, this constituted an acceptance and approval of the bond. The sheriff did endorse his approval on the bond, as the copy shows, but this was not necessary.

The presumption is, that an officer does his duty ; it was the privilege of the appellee to waive the right which the law gave him of executing a bond and retaining possession of the property, and the contrary not appearing, if necessary to sustain the action of the sheriff in accepting the bond and

Hartlep et al. v. Cole.

delivering the property to the appellant Hartlep, this court would presume a waiver.

The appeal bond was executed pursuant to the order of the court in granting the appeal which was taken in term. The court fixed the amount of the bond and approved the surety named, and designated the time within which the bond must be filed. This was an approval by the court, and though it is alleged in the paragraph of complaint that the clerk approved the bond, and though he assumed so to do by his endorsement thereon, this makes no difference. See section 638, R. S. 1881; Buskirk Practice, 61. The bond was filed within the time given by the court.

The first paragraph of the answer alleged, in substance, that, on the 13th day of October, 1885, and for a long time thereafter, the sheriff of Warren county had in his hands an execution duly issued on the judgment described in the appellee's complaint, commanding the said sheriff to take from the appellant Hartlep the mare, which was the property in controversy in the action of replevin, and deliver the same to the appellee, and to levy of the property of said Hartlep the sum of \$51 costs, and that the appellee, after the filing of his complaint in this action, and for a long time thereafter, and to the time of the filing of this answer, was prosecuting said execution, and said sheriff did collect thereon the sum of \$60.

The second paragraph of answer alleged, in substance, that the judgment described in the said second paragraph of complaint against the appellant Hartlep was rendered in an action wherein said appellant had replevied a mare from the appellee, who had taken the same upon an execution issued by Montgomery Myers, a justice of the peace of said county, for \$25 and costs; that since the beginning of said replevin suit, and since the beginning of this action, an execution duly issued by said Myers on said judgment on his docket had been placed in the hands of a constable of said county, who

Hartlep et al. v. Cole.

had served the same on said appellant since the bringing of this action.

These paragraphs of answer are not sworn to, and are not pleaded in abatement, but in bar.

The facts pleaded do not tend to show a defence to the cause of action, and if material for any purpose, it is as tending to show that the action ought to abate; but we do not regard them as material in any event.

The request for a special finding was not made at the beginning of the trial, but after the evidence had been partly heard. The bill of exceptions does not inform us how far the trial had progressed when the request for a special finding was made, except that the appellee was not through with his evidence in chief.

The statute (R. S. 1881) does not designate the stage of the proceedings after which it will be too late to request a special finding, but we are of the opinion that the Legislature did not intend that parties might delay until the trial was well under way and then require a special finding.

We think that it is due to the court that the request be made at the beginning of the trial, and necessary that substantial justice may be done.

Section 537, R. S. 1881, requires that the court make brief notes of the evidence of the parties when requested so to do by either party. The language of this section is imperative, as is the section in regard to a special finding, but evidently the request must be made at the beginning of the trial. If no request is made the court is not required to take any notes of the evidence; a trial is commenced and no such request made, the evidence is heard and concluded and the court has made no notes of the evidence.

At the conclusion of the evidence the court has the testimony sufficiently in mind to be able to make a general finding, but not sufficiently so to make such a statement of the facts as would be necessary in a special finding; the request is then made for the first time for a special finding.

Hartlep *et al.* v. Cole.

What is the court to do? but one of two things, to make an inaccurate statement of facts from an imperfect recollection, or re-try the case. Again, the court may take brief notes, as required, when requested to make notes, and yet the character of the evidence be such that to make an intelligent and proper special finding full notes would be required. If the request is made with the beginning of the trial, the court makes preparation as the trial progresses, and at the conclusion of the trial is fully prepared to make a special finding, and we think that it is no hardship on the parties if they desire a special finding, to request it when the trial begins. We are of the opinion that if the request for a special finding is not made at the commencement of the trial, the right thereto is waived, and thereafter it becomes a question within the sound discretion of the court whether it will make a special finding or not.

Section 546, R. S. 1881, provides that "the court shall, at the request of either party, direct them (the jury) to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing."

In *Kopelke v. Kopelke*, 112 Ind. 435, the construction of the section of the statute from which we have quoted was under consideration, and the question involved was very similar to the one now under consideration, and the court, through the learned judge who wrote the opinion, said: "It will be seen from these provisions that the code, while it imperatively requires the court, at the request of either party, to instruct the jury, if they render a general verdict, to find specially upon particular questions of fact, stated in writing, does not prescribe the time when such request shall be made, or when such written questions of fact must be presented to the court. Manifestly, these matters are left by the code, and properly so, we think, to the sound discretion of the trial court. We can not say that the court, in its action now com-

The City of Anderson v. Bain.

plained of, abused its discretion, nor can we say that such action was erroneous." See *Clark v. Deutsch*, 101 Ind. 491.

We find no error in the record.

Judgment affirmed, with costs.

Filed Oct. 8, 1889.

190	254
123	346
120	254
142	282

No. 13,833.

THE CITY OF ANDERSON v. BAIN.

STREETS AND ALLEYS.—Laying Out or Altering.—Reference to City Commissioners.—Assessment of Damages and Benefits.—Under sections 3166 and 3167, R. S. 1881, when a city undertakes to lay out a new street or alley, or to alter an existing one, it must refer the matter to the city commissioners provided for therein, for the assessment of the benefits and damages accruing to property owners from such improvement.

SAME.—Failure to Refer to City Commissioners.—Liability of City.—Where a city undertakes to widen an alley into a street without referring the matter to the city commissioners for the assessment of benefits and damages, thus depriving a property owner of the right to have his damages assessed in the manner prescribed by the statute, it is liable to such person for the damages which were assessable by the commissioners.

SAME.—What Damages Assessable by City Commissioners.—The city commissioners may assess damages accruing from the laying out or the altering of a street, but they have no power to assess damages resulting from the manner in which the street may afterwards be graded, or otherwise improved, and for damages of the latter kind the city does not become liable on account of its failure to refer the matter of the improvement to the city commissioners.

SAME.—Grading of Street.—When Lot Owner Entitled to Damages.—An abutting lot owner is not entitled to recover damages resulting from the original grading of a street, but to entitle him to damages on account of the grading of a street he must show that there was a prior established grade, and that the damages for which he sues were caused by a change therein.

From the Madison Circuit Court.

The City of Anderson v. Bain.

E. B. Goodykoontz and F. P. Foster, for appellant.
C. L. Henry and H. C. Ryan, for appellee.

OLDS, J.—The appellee was the owner of lot No. 11, in T. N. Stillwell's second addition to the city of Anderson; said lot fronted south on Canal street; there was an alley fourteen feet wide along the north end of said lot, also an alley fourteen feet wide running along the entire length of said lot on the west side thereof. Said Canal street, and the alleys running along and beyond said lots had been laid out and dedicated to the public use long before the acts and damages complained of in this case. The city of Anderson owned a strip of ground forty feet in width adjacent to and along the west side of the alley which ran along the west side of the said lot owned by the appellee, extending the entire length of said lot, and beyond the same both north and south; said forty-foot strip owned by the city extending from Williams street, a street running east and west one-half block north of appellee's lot, to Lane street, a street running east and west one block south of Canal street.

On the 6th day of April, 1885, the common council of the city of Anderson passed an ordinance for the opening, grading and gravelling of a new street, fifty-four feet in width, extending from Williams street to Lane street, two blocks in length, and crossing Canal street at the southwest corner of appellee's lot, which new street was located upon and included said fourteen-foot alley on the west of appellee's lot, and the forty-foot strip owned by the city as aforesaid, and designated said new street as School street. Said city then gave notice that it would receive bids for the opening, grading, and gravelling of said street; and, in pursuance of such notice, contracted with one John Green to open, grade, and gravel said street in accordance with plans and specifications adopted by the common council, and said Green commenced the said work in the summer of 1885, and completed it during that

The City of Anderson v. Bain.

year. This action is brought to recover damages to the appellee's property, the lot aforesaid.

The cause was put at issue, and there was a trial resulting in a judgment in favor of the appellee. The errors assigned are :

1st. "That the complaint does not state facts sufficient to constitute a cause of action."

2d. "The court erred in overruling the demurrer to the complaint."

3d. "The court erred in sustaining the demurrer to the second paragraph of answer."

4th. "The court erred in overruling the motion for new trial."

5th. "The court erred in overruling the motion in arrest of judgment."

The complaint alleges that the plaintiff is the owner of the lot, describing it, upon which there are now, and for more than two years have been, valuable buildings, consisting of a two-story dwelling-house, a wood-house, and other out-buildings, which lot abuts and adjoins on the west side thereof its entire length, 144 feet, along a public alley 14 feet wide, which alley was laid out and dedicated to the public use as a part of said "Stillwell's second addition;" that, on the 6th day of April, 1885, said defendant, by its common council, pretended to pass, enact, and adopt an ordinance for the opening, grading, and gravelling of a new street within the corporate limits of the city, designated as School street, describing the street, stating that the west line of plaintiff's lot constituted the east line of said new street; that the plaintiff's wood-house upon said lot is situate upon the west line of said lot, and abuts upon said street, and that her stable upon said lot is situate upon the alley in the rear of said lot; that after the passage of said ordinance, and in pursuance of the terms thereof, said city, by its common council, undertook to and did enter into a written agreement and contract with one John Green for the building, digging, constructing, and

The City of Anderson v. Bain.

making of said new street according to the terms of said ordinance, contract, and specifications of the city civil engineer of said city; that said Green, pursuant to the terms of said agreement, proceeded to and did make and construct said street according to said ordinance, specifications and agreement with said city, all of which was done without having referred said matter to the city commissioners of said city, whose duty it was to examine, and who might meet and examine, the property sought to be appropriated, and to view and examine the real estate in the vicinity of said new street that might be benefited or injured by the construction of said proposed new street, and that they might estimate the damages and injuries to the property and real estate injuriously affected by such improvement, and permit any person so injured and damaged to appear before such commissioners and show and prove to them any damages sustained. By reason of which failure to so refer said matter of said proposed street to said board of city commissioners, the appellee was wholly deprived of her right and privilege of having her damages assessed for said improvements, and of appearing before said commissioners and showing and proving any damages she might show herself entitled to by reason of said proposed street; that, in the construction of said new street as aforesaid, said contractor of said city, as aforesaid, cut down plaintiff's said lot the entire length thereof on the west side thereof to the depth of two feet, and cut the south or front end thereof gradually down to the depth of ten feet, but to the north or rear end of said lot, leaving plaintiff's said lot above said street after it was so constructed from two to ten feet the entire length of said lot, leaving the alley in the rear of said lot ten feet above the level of said newly constructed street, thereby cutting off all ingress and egress to the rear end of said lot situate and abutting on said alley; that by reason of said street having been so made and cut as aforesaid, plaintiff will be compelled to build a stone wall the en-

The City of Anderson v. Bain.

tire length of said lot to prevent the said lot from caving and undermining her said house, at a cost to her of three hundred dollars; that she was compelled to and did build a foundation under her wood-house that abuts on said new street at a cost of one hundred dollars; and that said defendant, by and through its said contract in the making of said street, caused to be hauled and carried away five hundred yards of earth, gravel, and soil belonging to plaintiff, of the value of one hundred dollars, and otherwise damaged plaintiff in all the sum of one thousand dollars, all by reason of the construction of said street; and there is a demand for judgment.

The appellant demurred to the complaint for want of sufficient facts, which demurrer was overruled, and exceptions taken.

Section 3166, R. S. 1881, provides that "There shall be appointed, once in each year, by the circuit court in the county wherein is situated any city of this State incorporated under the general act for the incorporation of cities, five freeholders, residents of said city, who shall constitute a body to be called city commissioners, and whose duty it shall be to hear and determine all matters appertaining to the acquisition, opening, laying out, altering, and straightening of streets, alleys, and highways within said city, and also to hear and determine all matters appertaining to the altering or straightening of streams within said city, and the taking of land for sewerage purposes," etc.

Section 3167 provides that "Before any matter of the opening, laying out, or altering of any street, alley, highway, or watercourse, or of the vacation thereof, shall be referred to the city commissioners, the common council shall refer the matter, to an appropriate committee, who shall examine the matter and report at the next meeting of the common council upon the expediency of so referring, and if the common council shall determine, by a two-thirds vote, to submit the said matter to the commissioners, it shall be so or-

The City of Anderson v. Bain.

dered, and shall thereupon be referred to said commissioners, as hereinbefore provided," etc.

Sections 3168, 3169, 3170, 3171, and sections following, prescribe the duties of the city commissioners. These sections provide for the assessment of damages to property, no part of which is taken for the improvement. The construction which, we think, should be placed upon these sections of the statute is, that all proposed street improvements "appertaining to the acquisition, opening, laying out, altering, and straightening of streets, alleys and highways within said city," shall be referred to said city commissioners, but preliminary to referring such matters to such city commissioners, the common council shall refer the matter to an appropriate committee, who shall examine the matter and report at the next meeting of the common council upon the expediency of so referring; and, when the committee report, the council take a vote upon the question of referring the matter to the city commissioners; if two-thirds vote in favor of referring it, the matter is referred; if two-thirds do not vote in favor of referring it, that ends the question of the improvement. It seems to us that the improvement made in this case clearly comes within the character of street improvements contemplated by these sections of the statute, and should have been referred to the city commissioners to assess the benefits and damages. If it can not be said to be the opening or laying out of a new street, it is certainly the altering of a street or alley; and it is unnecessary to determine which it was, as in either event it should have been referred to the city commissioners.

It is contended by counsel for appellant that the damages alleged relate to the improvement of the street, and that the action of the common council is governed by sections 3161, 3162, and 3163, R. S. 1881. The improvement in this case was not of an old street petitioned for under section 3162, and section 3161 is not in conflict with the construction we have given to sections 3166, 3167, and other sections referred to.

The City of Anderson v. Bain.

Section 3161 gives to the common council exclusive power over the streets, and the right to lay out, survey, and open new streets and alleys, and straighten, widen and otherwise alter those already laid out, etc., but sections 3166 and 3167 provide the manner in which the benefits and damages shall be assessed when the common council does make any alteration in a street or alley or lay out a new one.

The city in this case changed the alley into a street, making it, instead of an alley 14 feet in width, a street 54 feet in width, without referring the matter to the city commissioners for the assessment of benefits and damages, and in doing so the city exceeded its power, or rather neglected a plain duty prescribed by the statute, whereby the appellee was deprived of her right to have any damages she might sustain by reason of such change assessed by the city commissioners as prescribed by the statute; but the damages to be assessed by the city commissioners only relate to the damages which will accrue by reason of the opening of the new street or the change to be made in the street by reason of the change in the location, widening or narrowing the same, and does not include damages resulting from the manner in which the street may be improved after it is laid out and opened. As in this case there are two elements of damage, one the laying out of the street, changing it from a 14-foot alley to a 54-foot street; this damage, if any resulting to the appellee, would be assessable by the city commissioners, and she was deprived of the right of having it so assessed by the failure of the common council to refer the matter to the city commissioners, and for such damages as she has sustained by reason thereof she has a right of action against the city. But there is another element of damage, and the principal, if not the only, damage alleged in the complaint in this case, and that is the damage resulting from the grading of the street. This element of damage is not assessable by the board of city commissioners. Ordinarily, we presume, an ordinance provides for the opening of a street or the changing of it,

The City of Anderson v. Bain.

and the grading or improvement of it is an after consideration, provided for by a subsequent ordinance.

The lot-owner is not entitled to damages resulting from the original grading of a street. It is only when the grade of a street has been once established and afterwards changed, and the lot-owner sustains damage by reason of such change in the established grade of the street, that the lot-owner is entitled to damage. *City of Lafayette v. Nagle*, 113 Ind. 425. So that to entitle an abutting lot-owner to damages resulting from grading a street, he must show that there had been a prior established grade, and that the damage resulted by reason of the change. That is not done in this case. There is no averment in the complaint that there ever had been any established grade to the alley prior to the grade established and made by the city in making the alleged improvement to the street. The damages sued for in the complaint are damages resulting from the grading of the street, and not the widening of the alley into a street.

The complaint proceeds upon the theory that the city having failed to refer the matter to the city commissioners, it is liable to the appellee for all damages she may have sustained by reason of grading the street and cutting it down below the level of her lot, and it fails to allege that there ever had been any prior established grade to the alley. We think no damages are alleged which resulted from the mere change in the width; and if there is, it is evident the complaint was not framed with a view of basing a recovery on those damages, and a complaint, if good, must be so on the theory on which it is pleaded.

The demurrer to the complaint should have been sustained.

Taking the theory we do of the complaint, it is unnecessary to decide the other questions presented.

Judgment reversed, at costs of appellee, with instructions to sustain the demurrer to the complaint.

Filed Oct. 8, 1889.

 Clore v. McIntire, Administrator.

120	262
126	233
120	262
131	262
120	262
142	167

No. 13,868.

CLORE v. MCINTIRE, ADMINISTRATOR.

DAMAGES.—Wrongful Death.—Action by Administrator.—Next of Kin.—Complaint.—Where a complaint for damages resulting from the death of a person by the wrongful act of another, judged by its general scope and tenor, shows that the deceased left next of kin, and that the action is prosecuted by an administrator in his representative capacity, it is sufficient if it states a cause of action in his favor in that capacity, although some persons are described as next of kin who are not such.

SAME.—Driving Vicious Stallion into Crowd.—Liability for Injury.—One who drives a vicious and unmanageable stallion into a crowd of vehicles, standing in a place set apart for them, away from the travelled road, at an agricultural fair where there is a great gathering of people, and, knowing the vicious disposition of the horse, strikes him with a whip, thereby causing him to leap on a wagon and injure an occupant thereof, is liable for damages.

INSTRUCTIONS TO JURY.—Refusal to Give.—Supreme Court.—Where neither the evidence adduced nor the instructions given by the court are in the record, a ruling refusing to give instructions asked will not be considered on appeal.

From the Parke Circuit Court.

T. F. Davidson, F. M. Dice, M. D. White and W. S. Moffett,
for appellant.

G. W. Paul, J. E. Humphries, W. H. Thompson and J. West,
for appellee.

ELLIOTT, C. J.—The appellee describes himself in his complaint as the administrator of the estate of Rhoda McIntire, deceased, and avers that he was appointed on the 22d day of October, 1886. He also avers that Rhoda McIntire died intestate, leaving surviving her four children, George, Sallie, Lenora, and Harmon, and her husband, and that they are the next of kin and only heirs of the deceased. The facts pleaded as the cause of action, shortly stated, are these :

The appellee, his wife, Rhoda McIntire, and their children were attending an agricultural fair, and were sitting in

Clore v. McIntire, Administrator.

their vehicle, which was standing at a place set apart for vehicles, and away from the travelled ways of the fair ground; there were twenty thousand persons on the ground, and a great number of vehicles; the defendant wrongfully drove a large, unbroken, and unmanageable stallion, wild and vicious in disposition, through the fair, well knowing the disposition of the horse; while driving the stallion, and when passing the vehicle in which the deceased and her family were sitting, the defendant well knowing the danger of bringing an unmanageable and vicious stallion among the persons and vehicles on the ground, struck the animal with a whip, causing it to rear, kick, and jump; while the horse was jumping and kicking it leaped on the wagon where the deceased was sitting, overturned it, and the deceased was thrown to the ground and so bruised and wounded that she became ill, and so continued until she died. Her death resulted from the injury caused by the defendant's horse leaping on the wagon.

It is directly averred that the death of Rhoda McIntire was caused solely by the wrongful and negligent act of the defendant, and without fault on her part or that of the appellee.

The general frame and tenor of the complaint, as well as the material specific averments, require us to adjudge that this action is prosecuted by the appellee in his representative character, and not in his individual capacity. The fact that he was appointed administrator is well pleaded. He describes himself as administrator, and gives the names and ages of the children of his intestate. It is true, that in the conclusion of his complaint, he avers that "by the death of Rhoda McIntire he is damaged in the sum of ten thousand dollars;" but this can not be allowed to carry us to the conclusion that he sues in his individual capacity. Pleadings are not to be judged from general statements, or detached sentences, but from their general scope and tenor; and, so judging the pleading before us, it can not be construed as founded on a cause of action in favor of the husband. In construing the

Clore v. McIntire, Administrator.

complaint as one prosecuted by an administrator in his representative capacity, we do not, indeed, do any violence to the words we have quoted, for the just construction is, that they mean that the plaintiff as administrator was injured in the sum named.

As the recovery sought is by the appellee in his representative capacity, it is sufficient if the complaint shows a cause of action in him in that capacity. Hence, the question here is, not whether the husband is next of kin, but whether the case made is one in which an administrator can recover. If some persons are named who are not next of kin, and others are named who are next of kin, a right of action is shown in the administrator. It is not the next of kin who sue, although they may eventually be the beneficiaries; but it is the administrator, and there is, therefore, only one plaintiff. If there is a right of action in him, it can make no difference that some persons are erroneously described as next of kin. The fallacy of the appellant's argument lies in the initial proposition, implied, rather than stated, that the action is by several persons. As the action is by one person, the administrator, the complaint is good, if it shows a case entitling him to sue.

We are not concerned with the question as to who is entitled to the amount recovered, for the question immediately under discussion is, can the administrator maintain the action? Nor are we required to ascertain whether all the persons named are or are not next of kin, within the meaning of the law; for, if some are, the administrator may sue, so that we need not inquire or decide whether the husband is or is not next of kin within the meaning of the statute.

The law implies that some loss was suffered by the next of kin from the death of Rhoda McIntire. *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566; *Board, etc., v. Legg*, 93 Ind. 523. As there was, presumptively, some injury, the appellee, as administrator, has a right to prosecute this action. The question on the complaint is not as to the meas-

Clore v. McIntire, Administrator.

ure of recovery, but whether there can be any recovery at all.

We are far within the rule declared by our own and by other cases in holding, as we do, that the action is by the administrator in his representative character, and that the allegations of the complaint sufficiently show that the deceased left next of kin for whose benefit the administrator is entitled to sue under our statute. *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48; *Harper v. Norfolk, etc., R. R. Co.*, 36 Fed. Rep. 102; *Baltimore, etc., R. R. Co. v. Wightman*, 29 Gratt. 431.

The facts pleaded establish an actionable wrong. It can not be doubted that one who drives a vicious, unbroken, and unmanageable stallion among a crowd of vehicles standing in a place set apart for them, and away from the travelled road, at a great gathering of people, commits an actionable tort. If the appellant had kept the vicious animal on the roadways, there might possibly be some doubt as to his liability; but this he did not do, for he drove it in among vehicles standing in a place set apart for them, and distant from the roads intended for travel, and there can be no doubt as to his liability. Striking the vicious animal with a whip in such a place was a tortious act; for, knowing its disposition, he was bound to anticipate that injury might result to the occupants of the vehicles standing near by, and it was not necessary, to fix a liability upon him, that he should have anticipated the nature of the particular injury which actually resulted. The principle upon which we proceed is a very old one, and is illustrated by many cases. *Michael v. Ales-tree*, 2 Levinz, 172; *Dickson v. McCoy*, 39 N. Y. 400; *MoIlvaine v. Lantz*, 100 Pa. St. 586; *Meredith v. Reed*, 26 Ind. 334; *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544, 566.

The instructions given by the court are not in the record, nor is the evidence, and we can not consider any questions

 McCracken v. Cabel *et al.*

upon the ruling refusing instructions. *Puett v. Beard*, 86 Ind. 104; *Bowen v. Pollard*, 71 Ind. 177.

In the absence of the evidence and the instructions, we can not consider the motion to modify the judgment, for the presumption is that the trial court did its duty and tried the case upon the proper theory upon the question of damages, as well as upon all other questions.

Judgment affirmed.

Filed Oct. 8, 1889.

120	266
128	260
130	266
143	183
120	266
144	167

 No. 14,843.

MCCRACKEN v. CABEL ET AL.

APPEAL.—*Will not Lie after Receiving Part of Judgment.*—Where a judgment defendant pays to the clerk of the court the amount of the judgment, and the plaintiff's attorney, prior to being discharged, receives from the clerk the amount of his lien for services, the plaintiff is precluded by section 632, R. S. 1881, from thereafter taking an appeal from the judgment.

From the Daviess Circuit Court.

A. J. Padgett and *A. Paget*, for appellant.

W. R. Gardiner and *S. H. Taylor*, for appellees.

COFFEY, J.—This was a proceeding instituted in the Daviess Circuit Court by the appellees to condemn land for a right of way for a lateral railroad under section 3987, R. S. 1881, with a view of reaching a coal mine in said county.

The report made by the viewers appointed by the court was excepted to by the appellant John McCracken, over whose land the proposed railroad ran, and the cause, as to him, was tried in the circuit court by a jury, who returned a verdict in his favor for the sum of \$320.45, upon which judgment was rendered. His attorneys of record, Messrs. Baker

McCracken v. Cabel *et al.*

and Padgett, took a lien upon said judgment for the sum of \$150, their fees for obtaining said judgment.

The appellees paid to the clerk of the court the full amount of the said judgment, interest, and costs, and the said clerk paid to the said Baker and Padgett \$150 of the money so collected on the judgment, and they receipted him therefor.

Subsequently this appeal was taken, and the appellees now move to dismiss the appeal, under the provisions of section 632, R. S. 1881.

That section provides that appeals may be taken from the circuit courts and superior courts to the Supreme Court by either party from all final judgments, except in actions originating before a justice of the peace or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars: *Provided, however,* That the party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon.

This statute would seem to be conclusive upon the question here involved. It is not denied by the appellant that his attorneys had authority to receive and receipt for any and all moneys collected on the judgment obtained by them for him. Their receipt for the money at any time before they were discharged bound their client and relieved the clerk from any liability to the judgment plaintiff.

Upon the principle that the client is bound by the acts of his attorney when the act is within the scope of the attorney's employment, we think it must be held that the appellant had accepted money upon the judgment which he seeks to reverse upon this appeal, before the appeal was taken. The money was paid in July, 1888, and the appeal was not taken until March, 1889. We think the motion to dismiss the appeal should be sustained. *Clark v. Wright*, 67 Ind. 224; *Baltimore, etc., R. R. Co. v. Johnson*, 84 Ind. 420; *Sterne v. Vert*, 108 Ind. 232; *Sterne v. Vert*, 111 Ind. 408.

The appeal is dismissed, at the costs of the appellant.

Filed Oct. 8, 1889.

The State v. Jenkins.

120	268
120	300
130	268
125	108
120	268
151	513

No. 15,081.

THE STATE v. JENKINS.

CRIMINAL LAW.—*Assault and Battery, with Intent to Murder.—Indictment.—Sufficiency of.*—An indictment for assault and battery with intent to commit murder, charged that G. J. “did then and there unlawfully, in a rude, insolent and angry manner, touch C. W., with the intent then and there him, the said C. W., feloniously, wilfully, purposely, and with premeditated malice to kill and murder, contrary,” etc.
Held, that the indictment is good, under the statute, and that it was error to quash the part thereof relating to the felonious intent.

From the Sullivan Circuit Court.

L. T. Michener, Attorney General, *W. C. Hultz*, Prosecuting Attorney, *J. H. Gillett* and *O. B. Harris*, for the State.
J. T. Hays and *H. J. Hays*, for appellee.

BERKSHIRE, J.—This is an appeal by the State. The defendant was indicted in the court below for an assault and battery with intent to commit the crime of murder.

The charging part of the indictment is as follows: “That one George Jenkins, late of said county, on the 3d day of February, 1889, at said county and State aforesaid, did then and there unlawfully, in a rude, insolent and angry manner, touch Charles Wells, with the intent then and there, him, the said Charles Wells, feloniously, wilfully, purposely, and with premeditated malice to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.”

The defendant moved the court to quash all of that part of the indictment relating to the felonious intent charged, which motion was sustained by the court, and the attorney for the State reserved the proper exception, and that the decision of the court may be reviewed the State prosecutes this appeal.

The State v. Jenkins.

In our opinion the court erred in quashing the said part of said indictment.

The gist of the offence, whether it be a simple or a compound assault and battery, consists in the acts which constitute the assault and battery. It has long been the law of this State, that an assault and battery is well charged if the language of the statute creating the offence is followed, or equivalent language employed. *Cranor v. State*, 39 Ind. 64; *Sloan v. State*, 42 Ind. 570; *State v. Wright*, 52 Ind. 307; *Knight v. State*, 84 Ind. 73; *State v. Smith*, 74 Ind. 557.

We can not imagine any good reason for requiring greater particularity in this respect in a compound than in a simple assault and battery, and none has been suggested.

The intention which exists in the mind of the accused when the offence is committed not being tangible, nothing more can be alleged with reference to it than to allege its existence in the language of the statute.

It is contended that the word "thereby," or some other equivalent word, should have followed the word "touch," so as to connect it with the felonious intention, as "that one George Jenkins, late of said county, on the 3d day of February, 1889, at said county and State aforesaid, did then and there unlawfully, in a rude, insolent, and angry manner, touch Charles Wells with the intent then and there and *thereby* him, the said Charles Wells," etc. No more certainty under our code of criminal procedure is required in a criminal than in a civil pleading; all that is necessary is that the averments be certain to a common intent. R. S. 1881, sections 1731 and 1755; *McCool v. State*, 23 Ind. 127; *Meiers v. State*, 56 Ind. 336. That the indictment under consideration was thus certain as to the degree of felonious homicide intended to be charged there can be no question.

The statement is simple, plain and direct that the defendant committed the assault and battery charged, and that his purpose was to commit the crime of murder in the first degree. Nothing could be added to it to make it more so, and

The Supreme Sitting Order of the Iron Hall v. Stein.

to interpolate the word "thereby," or any equivalent word, or any number of equivalent words, would be tautology, and spoil the euphony and simplicity of the sentence. *Williams v. State*, 47 Ind. 568, is a case squarely in point, and has never been overruled. *Buntin v. State*, 68 Ind. 38, decides the principle; also, *State v. Miller*, 98 Ind. 70.

It was held in *Scudder v. State*, 62 Ind. 13, that it is sufficient to charge the *intent* in the language of the statute; and, again, in *Skaggs v. State*, 108 Ind. 53. *Smith v. State*, *supra*, is not in conflict with our conclusion, but supports it. The indictment was held bad because the word "felonious," one of the words descriptive of the crime, as defined by the statute, was omitted.

We are of the opinion that the indictment contained all of the necessary allegations to a good indictment for an assault and battery with the intention to commit murder in the first degree, and that the court erred in its ruling and in quashing that part of the indictment relating to the felonious intention.

Appeal sustained, at the costs of the appellee.

Filed Oct. 10, 1889.

190	270
196	66

No. 15,002.

THE SUPREME SITTING ORDER OF THE IRON HALL v.
STEIN.

- **BENEFIT SOCIETY.**—*Sick Benefits.*—*Remedy within the Order.*—*Right to Resort to Courts.*—Where the only right of appeal allowed a member of a benefit society with respect to a claim for sick benefits is from the decision of the supreme medical officer of the society thereon, the refusal of an officer of the local branch to which the claimant belongs, whose duty it is to do so, to certify to his claim, the justness of which is not

The Supreme Sitting Order of the Iron Hall v. Stein.

questioned, thereby preventing him from presenting it to the supreme medical officer for decision, in the manner required by the laws of the society, exhausts his remedy within the order, and he may resort to the courts to enforce his claim.

From the Marion Superior Court.

A. W. Wishard, for appellant.

W. Wallace, for appellee.

OLDS, J.—This is an action by the appellee to recover \$150 on account of sick benefits claimed to be due him from the appellant.

The case was put at issue, a trial had, and judgment was rendered for the appellee for \$150.

The appellant is a charitable and benevolent society, incorporated, pursuant to the laws of the State of Indiana. As set out in its articles of association, "the principal objects of the order of the Iron Hall, of which this association is the head, shall be to unite in bonds of union, protection, and forbearance all acceptable white persons of good character, steady habits, sound bodily health, and reputable calling, who believe in a Supreme Intelligent Being, the Creator and Preserver of the Universe; to improve the condition of its membership morally, socially, and materially, by instructive lessons, judicious counsel, and timely aid, by encouragement in business, and by assistance to obtain employment when in need; to establish a benefit fund from which members of the said order who have complied with all its rules and regulations, or the heirs of such members, may receive a benefit in a sum not exceeding one thousand dollars (\$1,000), which shall be paid in such sums and at such times as may be provided by the laws governing such payment, or in the certificate of membership, and when all the conditions regulating such payment have been complied with."

The appellee was a member of Local Branch, No. 379, of appellant, located at St. Louis, Missouri.

The Supreme Sitting Order of the Iron Hall v. Stein.

The case is presented upon the evidence, a motion for a new trial having been made by appellant and overruled, and exceptions taken.

The evidence shows that at the time of appellee's admission into the order he made and submitted to Local Branch, No. 379, the following application for membership :

"PETITION FOR MEMBERSHIP.

"ST. LOUIS, April 20th, 1887.

"To the Officers and Members of Local Branch, No. 379, O. I. H.

"Having conceived a favorable opinion of the purpose and objects of your order, I respectfully ask to be admitted thereto as a member of your branch, and apply for a certificate, in amount of \$1,000. I agree, if admitted, to conform to all the laws, rules, and usages of the order, and to promptly comply with all lawful requirements.

"I further expressly stipulate and agree that the answers which I have made, or shall make, to the questions asked in connection with this application, are full, true, and complete statements of all matters touched upon thereby, and that any evasion, concealment, or withholding of information in said answers or in this petition, shall work a complete and final forfeiture of all benefits from said order to which I might otherwise have been entitled; that I will not enter into any legal proceedings against the order for any claim I may have for sick benefits or total disability until I have first exhausted all remedy within the order as prescribed by the laws, as set forth in the constitution and ritual of the order.

"FRITZ STEIN, *Petitioner.*"

At the time appellee was initiated into the order, and became a member of Local Branch, No. 379, he took and signed the following obligation :

"LOCAL BRANCH, NO. 379, ORDER OF THE IRON HALL.

"April —, 1887.

"I, Fritz Stein, having made a voluntary petition for

The Supreme Sitting Order of the Iron Hall v. Stein.

membership in the Order of the Iron Hall, do solemnly swear, that, if accepted, I will faithfully abide by all the laws, rules, and regulations of the Supreme Sitting, or of this branch, or of any other branch of the Order of the Iron Hall of which I may become a member, and all additional laws and amendments that may hereafter be enacted; and in consideration of my membership therein, I do further pledge my sacred honor that I will present only just claims for sick benefits; that I will accept as just whatever amount shall be allowed me by the branch of which I may be a member, upon each and every claim for sickness or disability that I may present for benefits, that the same shall be a full settlement therefor; and I further promise and agree that I will not object to a review of any claim for benefits that I may file for sickness or disability by the supreme medical director, and his decision thereon shall be accepted by me as a final settlement for the amount due me on any claims so submitted. I further promise and agree that I will not enter into any legal proceedings against the order for any claim I may have for benefits or membership until I shall have first exhausted all remedies of appeal within the order as prescribed by the laws, rules, and regulations now in force, or which may hereafter be enacted, as set forth in the application, ritual and constitution of the order. FRITZ STEIN."

The laws of the order prescribe the following mode of allowance and payment of sick benefits:

"Section 7. When a member has been sick for one full week, and said sickness has been properly certified to by his attending physician, and certified to by the relief committee and medical examiner of his branch, after a full recovery from said sickness, and the approval of his claim by the supreme medical director, the sum due said member as prescribed in his certificate, on proper proof by the supreme accountant, shall be paid; and such payments shall be charged against the member by the supreme accountant and

The Supreme Sitting Order of the Iron Hall v. Stein.

indorsed on the back of the certificate, and in like manner until one-half of the amount named in said certificate shall have been paid: *Provided*, That in no case shall a member be entitled to benefits whose sickness has been less than one week's duration, nor for sickness that may occur within the first sixty days from the date of initiation, nor for any fractional part of a week, nor for a time longer than one week prior to the date of notice of sickness to the officers of the branch. Benefits shall be allowed only to members whose sickness or disability renders them incapable of pursuing their usual vocation, and only for the number of weeks during which they remain incapable of following their ordinary business pursuits."

The law of the order authorizing an appeal is as follows:

"ARTICLE XIII. MODE OF APPEAL.

"Section 1. Any members considering that injustice has been done them by this branch, or by the disapproval of their claim for sick benefits by the supreme medical director, shall, within one month after such decision or disapproval, make a written appeal to the Supreme Sitting, or supreme justice, stating their reasons therefor. Immediately upon making the appeal, they must notify this branch of the fact. This branch, within one month after receiving such notice, shall forward to the Supreme Sitting, or supreme justice, a copy of all the minutes of this branch relating to the subject, together with the journal and testimony taken by the committee, certified to by the chief justice and accountant, with the seal of the branch attached; the member making the appeal must certify to the Supreme Sitting, or supreme justice, that he has notified this branch of the appeal. Should either party neglect his duties, the appeal may be considered as dismissed to the disadvantage of the branch or of the member.

"Section 2. Any member who has been expelled by this branch for any reason other than non-payment of dues, fines

The Supreme Sitting Order of the Iron Hall v. Stein.

or assessments, shall not be restored to membership in this or ~~any~~ other branch without the permission of the Supreme Sitting, ~~or, in~~ case it is not in session, of the supreme justice."

There is ~~no~~ controversy made in the case as to the appellee's sickness, as ~~alleged~~, nor is it controverted that he gave the proper notice of his sickness, and that he was, at the time of the sickness, a member of the order in good standing; and is, in fact, entitled to sick benefits to the amount of \$150.

The contention on the part of counsel for appellant is, that this suit could not be brought by the appellee until he had exhausted all remedies of appeal within the order as prescribed by the laws, rules, and regulations of the order, and that appellee had not exhausted all remedies of appeal within the order as prescribed by the laws, rules, and regulations of the order when he brought this suit; that he had never presented his claim to the supreme medical director for approval, nor had he taken any appeal from the decision of such supreme medical director, as prescribed in the laws of the order.

All the means we have of ascertaining what are the laws, rules, and regulations of the order, are as they appear from the record in this case, and we have set out such as are contained in the record and have any bearing on the question presented.

By section 7 of the by-laws the member is required to have his sickness certified to by his attending physician and the relief committee and medical examiner of the branch of the order to which he belongs, and present such certificate to the supreme medical director for approval.

Article 13, section 1, provides for an appeal being taken from the decision of the supreme medical director disapproving a claim for sick benefits.

As it appears from the laws of the order, as set out in the record in this case, it is the duty of the member to present to the supreme medical director the certificate of his sickness, signed by his attending physician and the relief com-

The Supreme Sitting Order of the Iron Hall v. Stein.

mittee and medical examiner of the branch of the order of which he is a member.

There is no authority for the supreme medical director to allow any claim for sick benefits except such sickness be certified to by all of these persons. It is conceded by counsel in this case that one of the officers of the local branch, who was required to certify to such sickness, when requested and demanded, refused to sign the certificate of such sickness for the appellee; therefore the appellee could not procure such a certificate signed by the proper officers of the local branch, as he was required to present to the medical director, nor such a certificate as the director was authorized, under the laws of the order, to approve. Under this state of facts was the appellee required to present such certificate, improperly certified, to the supreme medical director, knowing it must, under the laws of the order, be disallowed, and take an appeal from his decision. That is to say, the appellee, as proven by the uncontroverted evidence in this case, and conceded by the counsel, had a valid claim for sick benefits to the amount he was demanding, and one of the officers of the local branch to which he belonged, whose duty it was to sign a certificate, refused to sign it, and the appellee was unable to procure a proper certificate of his sickness by reason of the wilful neglect of this officer to discharge his duty. Was the appellee bound to file such certificate, not properly verified, before the medical director, and appeal from his decision? We do not think he was. He was prevented from presenting a proper certificate of his sickness to the medical director by reason of the wilful neglect and refusal of an officer of the order to sign the certificate, as it was his duty to do, under the conceded facts in this case, and we think the appellant can not defeat a recovery in this case by reason of the conceded neglect of the officer of the local branch to discharge his duty.

It remains, then, to determine whether there was any other course the appellee might or should have pursued. Was

The Supreme Sitting Order of the Iron Hall v. Stein.

there any right given him to appeal from the action of the local branch in refusing to sign his certificate? We think there was not, and that there is no appeal provided from such refusal of the officers of the local branch to sign a certificate as to the sickness of the member.

As it will be seen, section 1, article 13, provides that "Any members considering that injustice has been done them by this branch, or by the disapproval of their claim for sick benefits, by the supreme medical director, shall, within one month after such decision or disapproval, make a written appeal to the Supreme Sitting or supreme justice." This section, as we interpret it, contemplates and gives the right of appeal from the action or decision of the local branch to which the member belongs. It contemplates that the local branch may take action in regard to, and affecting, the rights of one of its members, and from any such decision by the local branch the member might appeal to the Supreme Sitting or supreme justice from such decision; but as regards claims for sick benefits, as appears from the laws of the appellant, set out in the record, they are not required to come before the local branch, or to be passed upon by it. Another mode is prescribed for their allowance and payment, viz.: The member shall procure a certificate as to his sickness, signed by his attending physician and relief committee, and medical examiner of the branch to which he belongs, and present to the supreme medical director for allowance, and from the action of such medical director he has an appeal, but the laws do not give to him the right of appeal from the action of the officers of the local branch in refusing to sign his certificate. The only duty of the medical director to allow such benefits, pointed out by the laws of the appellant, as set out in the record, is in section 7, which provides for his approval of the member's claim for sick benefits; for various reasons the medical director might disapprove such claim, if it was not properly certified; if the sickness had occurred within the first sixty days from the date of the member's in-

The Supreme Sitting Order of the Iron Hall v. Stein.

itation, and the appeal would lie to determine whether the decision of the medical director was correct or not. Why then require the member to present a claim to the supreme medical director for allowance which was not properly certified and entitled to allowance by him?

Conceding, but not deciding, for it is unnecessary to decide the question in this case, that the law is as contended for by counsel for appellant, viz.: that the appellant was bound by his contract not to institute legal proceedings for the collection of his claim until he had exhausted all remedies of appeal within the order, as prescribed by the laws, rules, and regulations of the order, it was the duty of the appellant to prescribe in its laws a specific mode for the presentment and allowance of claims for sick benefits, and provide a mode of appeal from such officer or branch to whom, or which, the claim was to be presented. The laws of the order, which we have been referred to, do not make any such provision. The only appeal prescribed in case of sick benefits is from the medical director, and he is not empowered with authority to allow or fix the amount, but to approve the claim after it has been properly certified, or he may, no doubt, disallow the claim. Section 5, as set out in the record, provides that the supreme medical director shall carefully examine all reports and papers relating to the sickness or disability of a member of the order, and render his decision thereon; but section 7 points out the mode by which the claim shall be presented to him.

There is no controversy made in the case in regard to the right of the appellee to the benefits claimed, and no excuse given for the refusal of the officer to sign his certificate. The conclusion we reach is, that the claim for sick benefits for which judgment was rendered was due the appellee, and he made a proper effort to have the local officers of the branch to which he belonged sign his certificate; one of them refused, without cause, to sign it. Under the laws of the order he was required to present the certificate, properly signed, to

Prilliman v. Mendenhall *et al.*

the supreme medical director; by reason of the neglect of the officer of the local branch he was prevented from obtaining, and was unable to obtain, a proper certificate of his sickness to present to the director. By reason of the neglect of such officer, the appellee was prevented from complying, and was unable to comply, with the laws and rules of the order; and having a just and lawful claim against the order, he had the right to bring suit, and the recovery can not be defeated by the appellant on the ground that one of the officers of a local branch of the order refused to sign his certificate, which would have enabled him to present his claim properly certified for allowance.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed October 9, 1889.

120	279
137	78

No. 13,648.

PRILLIMAN v. MENDENHALL ET AL.

TRIAL.—Finding by Jury.—When Deemed General.—Where the court, of its own motion and for its information, calls a jury to find as to the facts, the finding will be deemed a general, and not a special finding.

SUPREME COURT.—Questions Relating to Evidence.—When not Presented.—In the absence of a bill of exceptions, no question is presented upon the admission of evidence, or as to whether the evidence supports the finding.

From the Tipton Circuit Court.

J. Jones, for appellant.

J. I. Parker and *J. A. Swoveland*, for appellees.

Prilliman v. Mendenhall *et al.*

COFFEY, J.—This was an action in the Tipton Circuit Court by appellant against the appellees for an injunction. The cause was tried by the court, with questions of fact referred to a jury which it was required to find for the information of the court. The jury returned its finding of the facts to the court, upon which the court entered a finding and judgment for the appellees.

The assignment of errors in this court treats the facts found by the jury as a special finding of the court, and is predicated upon such finding as if it were a special finding of the court made at the request of one of the parties to the suit.

It is contended by the appellees that there is no special finding in the record, and that, therefore, there is no question presented for our consideration.

Section 409, R. S. 1881, provides that issues of law and issues of fact in causes that, prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defences, which, prior to said date, were of exclusive equitable jurisdiction, with causes of action or defences which, prior to said date, were designated as actions at law, and triable by jury, the former shall be triable by the court, and the latter by a jury, unless waived; the trial of both may be at the same time, or at different times, as the court, may direct: *Provided*, That in all cases triable by the court as above directed, the court, in its discretion, for its information, may cause any question of fact to be tried by a jury, or the court may refer any such cause to a master commissioner for hearing and report.

Section 551, R. S. 1881, provides that upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall

Prilliman v. Mendenhall et al.

first state the facts in writing, and then the conclusions of law upon them, and judgment shall be entered accordingly.

Under this latter statute, it has often been held by this court that where the record does not disclose the fact that the special finding was made at the request of one of the parties, it will be treated as a general finding. *Northcutt v. Buckles*, 60 Ind. 577; *Caress v. Foster*, 62 Ind. 145; *Weston v. Johnson*, 48 Ind. 1.

There was no request made by either party in the court below for a special finding of the facts, and we think the facts returned by the jury can not be treated in this court as a special finding of the trial court. The finding of the circuit court must be treated as a general finding for the defendants, and the questions which appellant seeks to raise as to the conclusions of law upon the special finding of facts do not arise in the case.

The appellant also assigns as error that the circuit court erred in overruling the motion for a new trial. The causes assigned for a new trial relate to supposed errors of the trial court in the admission of evidence, and in the fact that the evidence does not support the finding of the court.

There is no bill of exceptions in the record, and we have, therefore, no means of knowing whether the supposed errors exist or not.

It is further assigned as error that the court below erred in overruling the motion of the appellant in arrest of judgment.

We have read the record in this cause, and discover in it no reason for arresting the judgment. There is no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed Oct. 9, 1889.

Board of Comm'rs of Howard Co. v. State, *ex rel.* Michener, Att'y Gen'l.

120 282
158 88

No. 14,924.

THE BOARD OF COMMISSIONERS OF HOWARD COUNTY v.
THE STATE, EX REL. MICHENER, ATTORNEY GENERAL.

COMMON SCHOOL FUND.—*County Auditor's Statement.*—*Conclusive Character of.—Unconstitutional Act.*—The act of 1865 (Acts of 1865, Spec. Sess., p. 144), providing that the statement of the county auditors as to the amount of school funds held in trust by their respective counties, when approved by the superintendent of public instruction, "shall be taken as conclusive evidence of the facts therein contained," is unconstitutional.

From the Howard Circuit Court.

M. Garrigus, for appellant.

L. T. Michener, Attorney General, *J. C. Blacklidge*, *W. E. Blacklidge* and *B. C. Moon*, for appellee.

ELLIOTT, C. J.—The act of December, 1865, requiring county auditors to examine the records in their respective offices for the purpose of ascertaining the amount of school funds held in trust, provides that reports shall be made to the county commissioners, and that copies of the reports shall be forwarded to the superintendent of public instruction, and that the statement of the auditor, when approved by that officer, "shall be taken as conclusive evidence of the facts therein contained." Acts of Special Session, 1865, p. 144.

The question which is presented to us by the record and by the argument of counsel, is as to the validity of that part of the statute which declares that the statements shall be conclusive. The relator's contention is, that the part of the statute assailed is unconstitutional.

If the controversy were one between individual citizens it could be disposed of without difficulty, for it is well settled that the Legislature can not declare that an official report or document shall be conclusive evidence of the matters con-

Board of Comm'rs of Howard Co. v. State, *ex rel.* Michener, Att'y Gen'l.

tained in it. *Wantlan v. White*, 19 Ind. 470; *White v. Flynn*, 23 Ind. 46; *Scott v. Brackett*, 89 Ind. 413; *Johns v. State*, 104 Ind. 557; *Cooley Const. Lim.*, side pp. 368, 369. But here the question is one which concerns only public funds, in which individual citizens have no private interest, and the rule to which we have referred can not be strictly applied. The power of the Legislature over the funds of the State is very broad, and the only limitations upon its power are such as are embodied in the Constitution. If the question here concerned the general funds of the State, we should feel clear that the Legislature has the power to declare that an official statement, such as that provided for in the act under examination, shall be conclusive evidence of the truth of the matters stated in it.

The fund to which this controversy relates is, however, not a general one, but is a special one, set apart to a specific purpose and carefully guarded by constitutional limitations. The Constitution declares what shall constitute the fund, and ordains that "The principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished; and the income thereof shall be inviolably appropriated to the support of the common schools, and to no other purpose whatever." Section 3, article 8. Another provision of that instrument is this: "The several counties shall be held liable for the preservation of so much of the said fund as may be intrusted to them." Section 6, article 8. These provisions have little need of judicial interpretation, for they are very clear, and all that can be done is to hold, as we have always done, that the fund must be devoted to the support of the common schools, without the diversion from it of a penny for any other purpose whatever. *Board, etc., v. State, ex rel.*, 103 Ind. 497, and cases cited; *Board, etc., v. State, ex rel.*, 106 Ind. 270; *Board, etc., v. State, ex rel.*, 116 Ind. 329.

In *Board, etc., v. State, ex rel.*, 103 Ind. 497, and in *Board, etc., v. State, ex rel.*, 106 Ind. 270, it was held

Board of Comm'rs of Howard Co. v. State, *ex rel.* Michener, Att'y Gen'l.

that, where the controversy concerns school funds, settlements made with public officers are not conclusive, for the reason that the school fund is beyond legislative control. As the fund is placed by the Constitution beyond the power of the Legislature, it must follow that no act can be valid which attempts to prevent the proper authorities from reaching money belonging to that fund. As the Constitution, with force and emphasis, forbids the diminution of the fund, no steps can rightfully be taken by the Legislature which will directly or indirectly preclude the proper officers from securing all the money that belongs to the fund, or from compelling the counties to faithfully perform the duty enjoined upon them.

If money does belong to the fund, it must not, and can not, be withheld from it, and no legislation can be valid which declares that an officer's statement shall conclude the proper authorities from establishing the truth and securing the money for the fund into which the Constitution ordains that it shall go. The money due the school fund can not, by any legislative contrivance, be kept out of it, nor can any legislative scheme be framed that will conclude the courts from ascertaining the facts. No official statement can conclude the proper authorities and erect a barrier between them and the way to a recovery of money which the Constitution imperatively ordains shall inviolably and without diminution be preserved for school purposes.

Judgment affirmed.

Filed Oct. 11, 1889.

Hargrove v. John et al.

No. 13,751.

HARGROVE v. JOHN ET AL.

120	235
153	610

PLEADING.—*Answer.*—*Demurrer.*—*Amendment.*—*Waiver.*—Where a demurrer has been sustained to a paragraph of answer, and another paragraph is subsequently filed setting up substantially the same defence, the latter will be deemed an amendment, superseding the original paragraph, and error in sustaining the demurrer is waived.

EVIDENCE.—*Promissory Note.*—*Agreement to Allow Discount.*—*Declarations of Agent.*—Where, in an action upon a promissory note, the defendant claims a deduction in pursuance of an alleged agreement between him and the plaintiff, whereby a two per cent. discount was to be allowed on all payments made before the maturity of the note, it is not competent, where the agent has testified as to his authority, for the defendant to testify that the plaintiff's agent, to whom money was paid, deducted the discount, saying it was according to his instructions.

SAME.—*Letter Written at Instance of Party.*—*Showing of Authority.*—In such case, a letter purporting to have been written by a third person to the agent, at the instance of the plaintiff, is not admissible in the absence of evidence that the plaintiff authorized the letter to be written.

From the Hancock Circuit Court.

J. A. New and J. W. Jones, for appellant.

J. L. Mason and J. H. Mellett, for appellees.

OLDS, J.—This is an action by the appellees against the appellant on two promissory notes, one for \$2,500 and the other for \$1,500. The defendant answered in four paragraphs. The plaintiffs filed a separate demurrer to each paragraph of answer. The court sustained the demurrer to the fourth paragraph, and overruled it as to the others.

The fourth paragraph alleges that the plaintiffs' interests in the notes were separate, each owning a certain amount of the notes, and pleading a set-off against the interest of each. The defendant, Hargrove, without taking leave to amend the fourth paragraph, filed an additional paragraph of answer, numbered five, setting up substantially the same facts and

Hargrove v. John et al.

pleading the same items of set-off; which fifth paragraph was demurred to and the demurrer overruled, and the plaintiffs filed a reply to the first, second, third, and fifth paragraphs of the answer and the cause was tried, resulting in a finding and judgment for plaintiffs for \$224.68.

Error is assigned on the ruling of the court in sustaining the demurrer to the fourth paragraph of the answer. In the case of *Hunter v. Pfeiffer*, 108 Ind. 197, the court says: "Where a demurrer has been sustained to a pleading, any other pleading subsequently found in the record, which presents substantially the same cause of action, or defence, will be regarded as having been filed by leave of court as an amendment, and will be treated as having superseded the pleading, or paragraph thereof, which it amends; this, too, without regard to the manner in which the subsequent pleading is entitled." To the same effect is the holding of the court in *Trisler v. Trisler*, 54 Ind. 172. This is a just and equitable rule; the appellant was in no way injured by the ruling of the court in sustaining the demurrer to the fourth paragraph. He was permitted to plead the same facts, and set up the same defence in the fifth paragraph as was pleaded in the fourth. There is no available error in the ruling of the court sustaining the demurrer to the fourth paragraph of answer.

It is alleged in the first paragraph of the defendant's answer that the defendant was to have a discount of two per cent. on the amount of money paid to the plaintiffs upon the notes, before the maturity of the \$1,500, and that, in pursuance of such agreement, he had paid certain amounts before the maturity of the \$1,500, and was thereby entitled to the discount of two per cent. on such amounts so paid. Upon the trial of the cause, the evidence showed that the notes were in the hands of one Chandler for collection, and that defendant Hargrove had paid certain amounts upon the notes to said Chandler; Chandler having testified as a witness, and stated that the notes were in his hands for collection, and that he

Hargrove v. John *et al.*

had some instructions in regard to a discount to be allowed on the notes. The record shows that the defendant was recalled as a witness in his own behalf, and was asked to "state what was said in the bank at the time this last payment was made on this note." Objection was made to the question, and the objection sustained.

The witness was then asked to "state why the note was not surrendered at the time the four hundred sixty-two dollar payment was made;" objection was made to this question, and overruled, and the witness answered as follows: "Well, there was no jar in the settlement until we came to the last payment on the ledger, and he would not pay the last payment on the ledger; and he held that note from me until that was settled." To which testimony the plaintiff objected, and the court sustained the objection. Whereupon the defendant, by counsel, stated: "We propose to show by this witness that at the time this four hundred and sixty-two dollar payment was made to Mr. Chandler, Mr. Chandler was the agent of the plaintiffs, and deducted one hundred and twenty dollars discount, the same being two per cent. from the fifteen hundred-dollar note for four years, and said to the defendant that was in pursuance of his instructions as agent of the plaintiffs, and that was in consideration of the fact that he was then making, and had made, full payment of the note before its maturity."

The allegations in appellant's answer are, that it was agreed between him and the plaintiffs that he should have the two per cent. discount.

We do not understand from the brief of counsel for the appellant that it is contended that such contract was made between the appellant and Chandler as the agent of the appellees. As contended by counsel, the question is presented in this way: It is claimed by appellant that he and the appellees had agreed that if he paid a certain amount before the \$1,500 note became due he should have a discount on the amount paid of two per cent., and afterwards the notes were

Hargrove v. John et al.

placed in the hands of Chandler for collection, and appellant paid a certain amount, and appellees brought suit upon the notes, and appellant claims credit for a deduction of two per cent. on the amount paid from the amount of the note. There is no controversy as to the amount paid to Chandler, but the question in issue is, whether, by a contract with the appellees, the appellant is entitled to a credit for the amount of the discount; and appellant, when testifying in his own behalf, asks to testify that when he made a certain payment to Chandler, Chandler deducted the amount of the discount, and said it was in pursuance of his instructions as agent. If permitted to give this testimony it would be simply Chandler's conclusions, drawn from his conversations, or contracts, or letters, with or from the appellees. But the fact in issue in the case was not whether Chandler allowed it or not, but whether appellant was entitled to that amount of credit in this suit; and Chandler had testified upon the trial of this cause fully in regard to his authority and relations with the appellees.

The evidence was not proper, and the court committed no error in excluding it, even if it can be said that the questions propounded were calculated to elicit the evidence, which is very doubtful.

The next alleged error discussed is the ruling of the court in sustaining an objection to the admission of a letter in evidence purporting to have been written by Flora E. John to Morgan Chandler, at the instance of the appellee, Mary C. John, but there was no evidence that the appellee authorized the letters offered in evidence to be written.

The next alleged error discussed by counsel is as to the amount of recovery, but no question is presented as to the assessment of damage, for the reason that there is no proper assignment of error in the motion for new trial. There is no error in the record.

Judgment affirmed, with five per cent. damages, and costs.

Filed October 10, 1889.

The Cleveland, Columbus, Cincinnati and Indianapolis R'y Co. v. Asbury.

190	289
195	104

No. 12,511.

THE CLEVELAND, COLUMBUS, CINCINNATI AND INDIANAPOLIS RAILWAY COMPANY v. ASBURY.

INTERROGATORIES TO JURY.—*Motion to Require Answers to be Made Certain.*—*Error in Overruling.*—Where, in an action to recover damages for negligence, defendant seeks to show contributory negligence on the part of the plaintiff, the jury having returned evasive and improper answers to interrogatories pertinent to the issue, it is error for the court to overrule a motion to require the jury to retire and make definite and certain the answers to the interrogatories.

From the Madison Circuit Court.

H. H. Poppleton, S. H. Holding, M. S. Robinson and J. W. Lovett, for appellant.

H. D. Thompson and T. B. Orr, for appellee.

BERKSHIRE, J.—This was an action instituted by the appellee to recover damages on account of personal injuries which she claims to have sustained because of the fault of the appellant.

The appellant filed but one paragraph of answer, which was a general denial.

There was a jury trial, a verdict returned for the appellee, and, over a motion for a new trial, a judgment rendered for the appellee.

The appellant appeals to this court, and assigns two errors, as follows :

1st. The court erred in overruling the demurrer to the complaint.

2d. The court erred in overruling the motion for a new trial.

The complaint charges negligence on the part of the appellant and want of negligence on the part of the appellee,

The Cleveland, Columbus, Cincinnati and Indianapolis R'y Co. v. Asbury.

and notwithstanding the use of the adjectives "wanton" and "wilful," and the allegation "with the intention to injure the plaintiff," we think, take the complaint as a whole, that the gravamen of the action is simple negligence, and that a good cause of action is stated.

There are several causes alleged in the motion for a new trial, but we will only notice those discussed in the briefs of counsel. But before considering the questions thus raised, we will notice a question of practice raised by the appellee. It is contended that the bill of exceptions which contains the evidence is not properly in the record, and should be disregarded.

In *Carver v. Carver*, 115 Ind. 539, which was an appeal from the same court from which this appeal comes, that part of the record containing the bill of exceptions was in the same condition exactly as the record before us, and this court held in that case that the record was properly made up. See *McCormick, etc., Co. v. Gray*, 114 Ind. 340.

Instruction numbered 2, asked by the appellee and given by the court, follows the language of the statute (section 4020, R. S. 1881), and we discover no substantial objection to it. The instruction would have been in better form had it omitted the words relating to the future, "or may be hereafter used," but we do not think that the appellant was prejudiced because of the insertion of those words in the instruction. The jury could but have understood from the instruction that the appellant was bound to furnish, as attachments to its locomotive engines, whistles and bells such as were at the time being used by all well-managed railroad companies.

The appellant, at the proper time, moved the court to require the jury to retire to their room to consider further of their answers to interrogatories numbered 4, 5, 6, 8, and 10, submitted to them at the request of the appellant, and to return definite, certain, and direct answers thereto, which motion was overruled, and an exception saved.

The Cleveland, Columbus, Cincinnati and Indianapolis R'y Co. v. Asbury.

These interrogatories, and the answers thereto, are as follows :

" 4. Did not Daniel Asbury, the owner of said horse, hear the whistle of the approaching train while driving said horse between the residence of Martha Helms and the crossing where the accident occurred ?

"Answer. We do not know by the evidence that it was the train whistle.

" 5. Could not the plaintiff and Daniel Asbury have seen the approaching train, or the head-light of its locomotive, if they had looked from a point on said highway thirty-five feet south of said crossing, in time to have averted the accident ?

"Ans. We don't know.

" 6. From a point thirty-five feet south of the crossing where the accident occurred on the highway or street along which Asbury drove, how far from said crossing could the approaching train be seen ?

"Ans. In daylight it might have been seen a mile.

" 8. How often was said whistle sounded before the accident as said train approached the crossing ?

"Ans. We don't know what crossing was meant.

" 10. Was not a bell attached to said engine, and was not said bell rung continuously from said tile-shed crossing to the place where the accident occurred ?

"Ans. There was a bell attached, but we do not know that it was rung continuously."

The answers to these interrogatories were evasive and improper. There was evidence bearing upon every fact covered by these interrogatories, and the jury should have answered them definitely and in direct language. It would have been no more improper had the jury returned a general verdict, " We, the jury, do not know whether we ought to find for the plaintiff or defendant," than to have returned the answers they did to the said interrogatories ; and the court should have declined to receive the answers returned, as it

The Cleveland, Columbus, Cincinnati and Indianapolis R'y Co. v. Asbury.

would have declined to receive a general verdict in the form we have given, upon proper objection made.

If there was a disagreement among the members of the jury as to the answers that should be made to the interrogatories, or if the evidence was such that they could not find the facts, or any of them, to which the interrogatories related, then the jury should have so informed the court, and in receiving the answers as made the court committed an error. It should have sustained the motion of the appellant, and required the jury to retire and return proper answers to the interrogatories, or, in case of a disagreement, to so inform the court. There seems to have been a disinclination on the part of the jury to answer the interrogatories; the answer to the eighth especially indicates that: "How often was said whistle sounded before the accident as said train approached the crossing." There was but one crossing in question, and that was the one where the accident happened, and the jury could but understand that that was the crossing referred to in the interrogatory, and yet they answer, "We do not know what crossing is meant."

The evidence was not complicated, and there was very little conflict, if any, as to many of the facts inquired for in these interrogatories, and especially those relating to the care and caution exercised by the appellee and her husband. The appellant was entitled to full and fair answers to its interrogatories. *Buntin v. Rose*, 16 Ind. 209; *Rosser v. Barnes*, 16 Ind. 502; *Sage v. Brown*, 34 Ind. 464; *Peters v. Lane*, 55 Ind. 391; *Maxwell v. Boyne*, 36 Ind. 120; *Reeves v. Plough*, 41 Ind. 204; *Hopkins v. Stanley*, 43 Ind. 553; *Noakes v. Morey*, 30 Ind. 103; *Summers v. Greathouse*, 87 Ind. 205; *Trout v. West*, 29 Ind. 51; *Duesterberg v. State, ex rel.*, 116 Ind. 144.

We are aware of the rule that the court may refuse to require the jury to retire and make more definite answers to interrogatories, and that it will not be available error if the answers demanded would not, if given, change the result as

The Cleveland, Columbus, Cincinnati and Indianapolis R'y Co. v. Asbury.

to the judgment to be rendered. *McCormick, etc., Co. v. Gray*, 100 Ind. 285 ; *Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398. But had the interrogatories under consideration been answered in the affirmative, they would have controlled the general verdict.

Affirmative answers to these interrogatories would have disclosed, beyond question, contributory negligence on the part of the appellee and her husband, and gone far in the direction of establishing due care on the part of the appellant.

The facts inquired for in the interrogatories under consideration are not covered by other interrogatories and answers thereto. The eleventh interrogatory is as follows :

" Could Daniel Asbury, by the exercise of ordinary care in driving said horse, and in using his senses of sight and hearing, have heard or seen said train in time to have averted the collision and injury ? " The answer is : " He could not. " The question and answer involve a legal conclusion, and can not be regarded. *Louisville, etc., R. W. Co. v. Worley*, 107 Ind. 320 ; *Louisville, etc., R. W. Co. v. Pedigo*, 108 Ind. 481 ; *Chicago, etc., R. R. Co. v. Ostrander*, 116 Ind. 259 ; *North Western, etc., Ins. Co. v. Heimann*, 93 Ind. 24.

We have said all we care to say with reference to the testimony given upon the trial.

Because of the error of the court in overruling the motion to require the jury to retire and make more definite and certain the answers to the interrogatories, the judgment must be reversed.

Judgment reversed, with costs.

Filed Oct. 11, 1889.

The Greensboro and New Castle Junction Turnpike Company v. Stratton.

No. 13,788.

THE GREENSBORO AND NEW CASTLE JUNCTION TURN-
PIKE COMPANY v. STRATTON.

CORPORATION.—Turnpike.—Director.—Services Rendered by in Construction of.—Compensation.—Where a director of a turnpike company, by agreement with his co-directors, performs labor and furnishes material necessary and proper in the construction and repair of the bridges and road-bed of the turnpike, the capital stock subscribed for the purpose having been exhausted, he is entitled to recover a reasonable compensation for such labor and materials.

From the Henry Circuit Court.

J. M. Brown and R. Warner, for appellant.

J. H. Mellett and E. H. Bundy, for appellee.

OLDS, J.—This is an action to recover for the value of work and labor done and performed by the appellee on the turnpike owned by the appellant at appellant's request, and for gravel and materials furnished by appellee to appellant, and used in the construction and repair of the road-bed and bridges of said turnpike.

There is no question as to the pleadings presented by the record. It is stated by counsel for appellant in his brief that a demurrer was sustained to the fourth paragraph of answer, and that the court erred in sustaining the demurrer, but the demurrer is not in the record.

The case, as stated by counsel as shown by the evidence, is to the effect that in 1877 the defendant company was organized to build a turnpike, and an amount of capital stock subscribed and directors to manage the affairs of the corporation elected, the appellee being elected one of the directors. The directors collected all the capital stock subscribed, and expended the same in the construction of the road; the funds were insufficient to complete the road; after the funds were

The Greensboro and New Castle Junction Turnpike Company v. Stratton.

exhausted, the directors made an effort to have a tax levied to complete the road, but did not succeed. The directors, then consisting of appellee and Wood and Copeland, agreed by and between themselves to finish the road, appellee to do three-fifths of the work and the others one-fifth each, and, pursuant to this agreement, they completed the road and put it in operation and collected toll for its use. Appellee was from time to time re-elected director, and served as such until the first of the year 1886, when he was succeeded as director, and brought this suit.

The only alleged error properly presented by the record and discussed, is the giving of instruction No. 2 by the court, which instruction is as follows :

“2d. If, at the time the work and labor sued for was done, the plaintiff was a director of the defendant company, no contract or agreement between him and his co-directors concerning said work or the price to be paid therefor, or the necessity or propriety therefor, could bind the company. But if the stock and means of the company were exhausted in building the road, and it was impossible by reason thereof to complete the road, and the directors agreed among themselves to complete the road, each doing a portion of the work necessary to finish the road according to the respective amounts of their stock, and charge the same to the company, and, in pursuance thereof, the plaintiff did a portion of the work sued for in finishing and completing the road, and it was to the best interest of said company to do said work, and it was necessary and proper to be done, taking into consideration all the circumstances and conditions of the road, the company would be liable in this action for the reasonable value of the work done.”

In Waterman's Law of Corporations, vol. 2, p. 367, the law is stated as follows : “ When a director performs duties outside of those devolving upon him as a director, under an appointment by a resolution of the board, he will be entitled to compensation.” Again, in vol. 1, p. 461, it is said : “ A

The Greensboro and New Castle Junction Turnpike Company v. Stratton.

director, by resolution of the board, may be empowered to transact any business or agency in behalf of the corporation; and unless there is some agreement express or implied from the circumstances attending such appointment, to the contrary, the law will infer a contract on the part of the corporation with its agent, whether he be a director or a stranger, that he shall receive for such service a reasonable compensation."

In the case of *Rogers v. Hastings, etc., R. W. Co.*, 22 Minn. 25, the plaintiff was a director of the company, and was, by resolution of the board of directors, appointed land commissioner of the company, and brought suit for his services as such commissioner; and the court says: "To entitle the plaintiff to recover for his services as land commissioner, it was not necessary that he should have received a formal appointment from the board, nor that his employment should have been formally authorized or ratified. If the services were performed under employment by an officer of the company, with the knowledge of the directors, and the company receive the benefit of them without objection, the company is liable upon an implied contract to pay the reasonable worth of the same."

In the case of the *Santa Clara Mining Ass'n v. Meredith*, 49 Md. 389, the court states the rule of law to be, that "If a president or director of a corporation renders services to his corporation which are not within the scope of, and are not required of him by, his duties as president, or director, but are such as are properly to be performed by an agent, broker or attorney, he may recover compensation for such services upon an implied promise."

This, we think, the true rule, as supported by the great weight of authority. *Chandler v. Monmouth Bank*, 1 Green (N. J.) 255; *Shackelford v. New Orleans, etc., R. R. Co.*, 37 Miss. 202; *New Orleans, etc., Co. v. Brown*, 36 La. Ann. 138; *Cheaney v. Lafayette, etc., R. W. Co.*, 68 Ill. 570; *Henry v.*

The Greensboro and New Castle Junction Turnpike Company v. Stratton.

Rutland, etc., R. R. Co., 27 Vt. 435 ; *Polk v. Reynolds*, 54 Ind. 449.

In the case of *Ward v. Polk*, 70 Ind. 309, it was held that one who was a director of a drainage association could recover on a contract made with the directors of the association for the labor performed by him, notwithstanding he was himself a director. *Bristol, etc., Co. v. Probasco*, 64 Ind. 406.

We regard the rule of law to be, that when a director of a corporation performs services for the corporation, which are independent and outside of his duties as such director, he has the same right to recover upon an implied contract for such services as though he was not a director, and the same rule applies in regard to materials furnished by a director and used by the corporation.

In this case it is conceded that the services rendered and materials furnished were necessary and proper, and enabled the company to finish and put the road in a condition for use, and to receive compensation for travel upon it, which it could not have done without the labor and materials furnished by the appellee, and he is entitled to recover a reasonable compensation for such labor and materials.

We think there is no error in the instruction given by the court of which the appellant can complain.

Judgment affirmed, with costs.

Filed October 11, 1889.

The State v. The Baltimore, Ohio and Chicago Railroad Company.

130	298
126	196

120	298
169	127

No. 14,882.

THE STATE v. THE BALTIMORE, OHIO AND CHICAGO RAIL-
ROAD COMPANY.

CRIMINAL LAW.—*Obstruction of Highway.*—*Corporation May be Prosecuted.*—A corporation may be prosecuted criminally for obstructing a public highway. Sections 1897 and 1964, R. S. 1881.

SAME.—*Removal of Obstruction.*—*Mandate.*—The fact that a corporation may be compelled by mandate to remove an obstruction placed by it in a public highway is not a defence to a prosecution for maintaining such obstruction.

SAME.—*Indictment for Obstructing Highway.*—All that is necessary to constitute a good indictment for obstructing a public highway is to allege such facts as meet the requirements of the statute defining the offence.

SAME.—*Criminal Intent.*—*Bad Faith.*—To constitute the offence of obstructing a public highway, it is not necessary, under the statute, that there be a criminal intent, and the indictment need aver none, nor need it aver that the acts were done in bad faith.

SAME.—*Condition of Highway before Obstruction.*—An indictment for obstructing a public highway need not allege the condition of the highway before the obstruction complained of.

From the DeKalb Circuit Court.

L. T. Michener, Attorney General, and *E. A. Bratton*, for the State.

J. H. Collins and *J. E. Rose*, for appellee.

BERKSHIRE, J.—This was a prosecution against the appellee for the obstruction of a public highway. The charging part of the indictment is as follows:

“That on the first day of March, 1888, at the county of DeKalb, in the State of Indiana, said Baltimore and Ohio and Chicago Railroad Company, over its right of way in said county, at the crossing of said railroad and a certain public highway located upon and along the line running north between the southeast quarter and the southwest quarter of section number three (3), in township number

The State v. The Baltimore, Ohio and Chicago Railroad Company.

thirty-three (33) north, of range number thirteen (13) east, did then and there unlawfully build, erect, and construct a certain high, precipitous, steep, unsafe, and dangerous bridge, thereby greatly obstructing and encumbering said public highway, and did unlawfully deposit large quantities of earth and other materials as approaches and embankments to said bridge, in a steep, dangerous and narrow manner and condition, as to obstruct travel on said highway, and rendering the same very dangerous and hazardous; and did unlawfully, from said first day of March, 1888, continuously until the finding of this indictment, continue to unlawfully maintain, obstruct and encumber said public highway in the unsafe, dangerous and hazardous condition as aforesaid; and did then and there, and during all of said time allow, suffer and permit said public highway to be so unlawfully encumbered and obstructed by said bridge embankments and approaches as aforesaid."

On motion of the appellee the court quashed the indictment; the appellant reserved an exception, and prosecutes this appeal, assigning as error the ruling of the court in quashing said indictment.

By virtue of section 1897, R. S. 1881, corporations are subject to prosecution, the same as natural persons, for creating, continuing, or maintaining a public nuisance, or for obstructing a public highway or navigable stream. Section 1964 makes it a criminal offence to obstruct a public highway.

It is contended by appellee's counsel that the remedy in cases like the one made by the indictment is by a writ of mandate to compel the corporation to remove the obstruction, or nuisance, and that the appellee is not, therefore, liable to be prosecuted for a criminal offence. This may be one remedy, but it is not exclusive.

Section 1964, *supra*, recognizes no such exception, and it would be judicial legislation for the courts to recognize any such exception. Besides, section 1897, *supra*, would have to be disregarded before such an exception could be recognized.

The State v. The Baltimore, Ohio and Chicago Railroad Company.

It is argued that the indictment is bad because it fails to charge a criminal intention. All that is necessary to a good indictment for obstructing a public highway is to allege such facts as meet the requirements of the statute. 1 Bishop Crim. Law, section 1075; *Nichols v. State*, 89 Ind. 298.

Under the statute, it is not necessary to the commission of the offence that the acts done be accompanied with a criminal intent.

A further contention is, that in the erection of its bridge the law allowed to the appellee a discretion, in the nature of a judicial discretion, and similar to that allowed to cities in the improvement of streets and alleys, and that to make the indictment good it was necessary for it to allege that the appellee acted in bad faith.

What we have already said is an answer to this contention. But if we concede, for the sake of argument, that in the erection of its bridge the appellee was allowed the discretion contended for, it would not follow that it would be allowed to continue the obstructions for the length of time alleged in the indictment.

Another objection taken to the indictment is, that the condition of the highway, before the obstruction, is not alleged. This was unnecessary. It is alleged that there was a highway; that the appellee obstructed it; the character of the obstruction is given, and it is alleged that travel was thereby obstructed, and the public greatly inconvenienced.

The allegations in the indictment are certain to a common intent, and this is all that is required. Sections 1731 and 1755, R. S. 1881; *McCool v. State*, 23 Ind. 127; *Meiers v. State*, 56 Ind. 336; *State v. Jenkins*, ante, p. 268.

We think the indictment is good, and that the court erred in quashing it. *Nichols v. State*, supra; *Bybee v. State*, 94 Ind. 443; *State v. Berdette*, 73 Ind. 185; *State v. Louisville, etc., R. W. Co.*, 86 Ind. 114.

Judgment reversed, with costs.

Filed October 12, 1889.

Giberson v. Jolley.

No. 13,922.

GIBERSON v. JOLLEY.

PROMISSORY NOTE.—Fraud.—Where one is induced to sign a promissory note by a cunningly devised scheme, preconcerted for the purpose of deceiving him, and made effective by false statements, a conclusion of fraud is warranted.

SAME.—Bona Fide Holder.—Notice of Fraud.—Burden of Proof.—In an action by an endorsee upon a promissory note which was obtained from the maker by fraud, the burden is upon the plaintiff to show that he is a *bona fide* holder of the note, which includes proof that he acquired it without notice of the fraud.

From the St. Joseph Circuit Court.

A. Anderson, for appellant.

L. Hubbard, for appellee.

ELLIOTT, C. J.—The evidence in this case warranted the jury in concluding that the promissory note on which the appellant's complaint is founded was obtained by fraud. The appellee was induced to sign the note by a cunningly devised scheme, preconcerted for the purpose of deceiving him, and made effective by false statements. The appellant is in error in assuming that all that the payee of the note did was to misrepresent the value and qualities of the so-called Bohemian oats which he induced the appellee to buy. Artifices were resorted to, and these were made means of deception.

The only question in the case which requires serious consideration or discussion is, was the appellant the *bona fide* holder of the note?

Where a promissory note is obtained by fraud there can be no recovery unless the plaintiff shows that he is in possession of it as a *bona fide* holder. It is held, with very little diversity of opinion, that the plaintiff must show that he acquired the note in good faith, although there is some diversity of opinion upon the question of what constitutes a

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192	280
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Giberson v. Jolley.

bona fide holder. In some of the cases it is held that he must show that he acquired the note for value, before maturity and without notice. In the case of *Baldwin v. Fagan*, 83 Ind. 447, it was said, in speaking of the evidence required of the plaintiffs that, "In other words, the burden was cast upon them of showing that they purchased and paid value for the note before it was due, without notice of the fraud by which it was procured." In *Zook v. Simonson*, 72 Ind. 83, the jury were instructed that, upon proof of fraud, "the burden of proof would rest on the plaintiffs to show that they took the note in ignorance of these matters. The plaintiffs having offered no evidence on that point, it will be the duty of the jury to consider only whether there has been shown a failure of consideration," and, after a very full discussion of the question, this instruction was held to state the law correctly. The cases to which we have referred have been followed in later decisions. *Mitchell v. Tomlinson*, 91 Ind. 167; *Eichelberger v. Old Nat'l Bank*, 103 Ind. 401. In stating the rule which governs in such cases as this, the court said, in *Coffing v. Hardy*, 86 Ind. 369, that "Under this law, the endorsee, before maturity, in good faith and without notice, of such a note as the one in suit, takes the same, as against the maker thereof, freed from all the equities which may have existed between such maker and the payee of the note." The question came up in *Scotten v. Randolph*, 96 Ind. 581, and it was said, in speaking of an averment of the complaint, that "It can not be said, we think, that the averment of 'good faith' is equivalent to the averment that the endorsee took the note without notice of the maker's defences." In *Baldwin v. Barrows*, 86 Ind. 351, the element that the endorsee received the note without notice is treated as essential to constitute him a *bona fide* holder as against a maker who has been induced to execute the note by the fraud of the payee. We have shown by these authorities that the rule has been long enforced in this State and in many instances, and we ought not to depart from our former decisions except for the

Giberson v. Jolley.

weightiest and most satisfactory reasons, and these we have not discovered. Our decisions are supported upon the point under discussion by those of other courts, and are well grounded in principle. In *Smith v. Popular Loan, etc., Ass'n*, 93 Pa. St. 19, it was said: "Where a negotiable note was obtained from the maker under false pretences, and fraudulently put in circulation by the payee, the holder of the note, in order to recover, must show a purchase for value before maturity, without notice of the fraud." It was said by the court, in *Tilden v. Barnard*, 43 Mich. 376, that "A transfer of the note before due for a valuable consideration is not sufficient." Another court holds that "The fact of fraud being established will throw upon the plaintiff the burden of proof, to show that he came by the possession of the note fairly and without any knowledge of the fraud." *Munroe v. Cooper*, 5 Pick. 412.

It would be a departure from principle to hold that the maker must prove that the holder had notice of the fraud. Whether he had notice or not is a matter peculiarly within his own knowledge. It needs no more than a bare statement of the proposition that the plaintiff's possession or non-possession of notice is a matter peculiarly within his own knowledge, to establish it to the satisfaction of a candid mind, and, if this proposition be established, then, it must follow that the proof should come from him, for few rules of law are better settled than that a party whose cause of action or defence rests upon facts peculiarly within his own knowledge, must prove those facts. This rule prevails even in prosecutions for crime. *Shearer v. State*, 7 Blackf. 99; *Goodwin v. Smith*, 72 Ind. 113. Nor is there any hardship in requiring the plaintiff to prove the circumstances under which he acquired the note, for none can know them so well as he, and no other person can so well know where to search for the facts. To impose the duty upon the defendant of showing the circumstances under which the plaintiff obtained the note, and of proving what he knew, would, in many cases,

Giberson v. Jolley.

demand of the defendant an impossible thing, and in all cases it would impose upon him a hardship and a burden from which justice requires he should be free.

It is not easy to conceive how one can be a *bona fide* holder of a note if he had notice of the fraud, and all the courts agree that the plaintiff who sues upon a note must, when evidence that it was obtained from the maker by fraud is given, prove that he is a *bona fide* holder. It would seem clear, therefore, that, to be consistent, they should hold that he must prove, not one, but all of the essential elements of the character of a *bona fide* holder. This can not be done without showing that the note was acquired by the plaintiff without notice, since, if not so acquired, it is not possible for him to be a *bona fide* holder within the meaning of the law.

In support of his adoption of the rule which relieves the plaintiff of the burden of proving that he did not have notice, Mr. Daniel gives this reason: "To require the plaintiff to show absolutely that he had no knowledge of facts would be to burden him with the necessity of proving an impossible negative." 1 Daniel Negotiable Inst. (3d ed.), section 819. The learned and usually very accurate author has fallen into more errors than one in this brief statement. The courts which hold that the burden is on the plaintiff to show that he is, in all the term implies, a *bona fide* holder, have never so much as hinted that absolute evidence is required. In no civil case is so high a degree of evidence demanded. It is, therefore, a mistake to assume that such evidence is meant by the cases which declare that the plaintiff must show that he is a good-faith holder of the bill or note. Nor do these cases require the proof of "an impossible negative," as the author assumes. The negative required is far from being an impossible one; on the contrary, it is not only possible, but easy for the plaintiff to prove the facts within his own knowledge, since if he knows that he bought the note he can not very well be ignorant of the facts attending its acquisition. Nor is it unusual to require a plaintiff to prove a negative;

Giberson v. Jolley.

it is, indeed, always required of him where the facts are peculiarly within his own knowledge and essential to his right of recovery. "Whenever," says Mr. Wharton, "whether in a plea, replication, rejoinder, or surrejoinder, an issue of fact is reached, then, whether the party claiming the judgment of the court asserts an affirmative or a negative proposition, he must make good his assertion." 1 Wharton Ev., section 354. In *Goodwin v. Smith, supra*, this question received full consideration, and a great number of authorities were cited in proof of the proposition that the general rule is that negative propositions must be proved, and these cases, as well as those collected by Mr. Wharton, conclusively show that the rule is a common, and not an extraordinary one, and is, indeed, one of almost universal application.

In holding a party who assumes that he is the *bona fide* holder of a promissory note bound to prove all the facts essential to invest him with that character, no more is done than to apply to the particular instance a familiar general rule of wide sweep.

We find nothing in the record which would justify us in overthrowing the finding of the jury upon the question of the appellant's knowledge of the existence of facts constituting a defence to the note.

Judgment affirmed.

Filed Oct. 12, 1889.

VOL. 120.—20

180	306
185	100
180	306
129	429

No. 13,829.

CUNNINGHAM v. JACOBS.

COMMON LAW.—*Presumption that it Prevails in Other States.*—In the absence of any showing to the contrary, the presumption is that the common law prevails in other States.

ATTACHMENT.—*Courts of Other States.*—*Jurisdiction.*—*Presumption.*—The writ of attachment is the creature of statute law, yet where a court of a State in which the common law is presumed to prevail has issued such a writ, in aid of a pending proceeding in which it had jurisdiction of the subject-matter and to which the defendant appeared, it will be presumed, in an action in this State upon the attachment bond, that the court did not exceed its powers.

SAME.—*Common-Law Bond.*—*Complaint on.*—An action may be maintained in this State upon an attachment bond executed in a proceeding had in the courts of a State in which the common law presumably prevails, without setting out any statute authorizing it to be taken, as such bond will be deemed a common-law bond, and a recovery may be had thereon under the rules applicable to actions on ordinary contracts.

From the Marion Superior Court.

J. E. McDonald, J. M. Butler, A. L. Mason and A. H. Snow, for appellant.

J. B. Black and H. J. Everett, for appellee.

COFFEY, J.—This was an action instituted in the Marion Superior Court upon an attachment bond executed in a suit pending in Vermillion county, in the State of Illinois, which bond is as follows :

"Know all men by these presents, That we, James A. Cunningham and Amos S. Williams, are held and firmly bound unto Abraham Jacobs in the penal sum of three hundred and twenty dollars and — cents, lawful money of the United States, for the payment of which said sum well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of January, 1882.

Cunningham v. Jacobs.

"The condition of the above obligation is such, that whereas the above bounden James A. Cunningham has, on the day of the date hereof, prayed an attachment out of the circuit court of Vermillion county, at the suit of himself, against the estate of the above named Abraham Jacobs, for the sum of one hundred and sixty-five dollars and — cents, and the same being about to be sued out of said court, returnable on the first Monday of February, A. D. 1882, to the term of the said court then to be holden; now, if the said James A. Cunningham shall prosecute his said suit with effect, or in case of failure therein shall well and truly pay and satisfy the said Abraham Jacobs, all such costs in said suit, and such damages as shall be awarded against the said James A. Cunningham, his heirs, executors or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void, otherwise to remain in full force and effect.

(Signed) "J. A. CUNNINGHAM. [SEAL.]

"A. S. WILLIAMS." [SEAL.]

It is averred as a breach of the above bond that the sheriff of Vermillion county, in the State of Illinois, by virtue of the writ of attachment issued in said proceeding, seized the goods and chattels of the appellee of the value of \$8,000; that the appellant, Cunningham, did not prosecute his said suit with effect, but that such proceedings were thereupon had in that suit that it was considered and adjudged by the said court and a jury that the appellee was not indebted to the appellant in any sum whatever, and that appellee recover of the appellant his costs therein; that by the wrongful suing out of said writ of attachment appellee was obliged to, and did, expend large sums of money in and about the defence of the said suit, and was thereby deprived of the use and benefit of his said property for one year, and was greatly injured in his credit at said county and elsewhere, and was wholly deprived and prevented from pursuing his business, and his said property so detained was greatly injured and

Cunningham v. Jacobs.

deteriorated in value, broken, lost, and destroyed ; that he lost three months' time in and about the defence of said suit, all to his damage in the sum of \$500, which is due and unpaid.

A demurrer to the complaint for want of sufficient facts to constitute a cause of action was overruled, and the appellant excepted. Upon a trial of the cause the appellee recovered a judgment.

The only question presented for our consideration relates to the sufficiency of the complaint as a cause of action.

It is contended by the appellant that an attachment proceeding was unknown to the common law, and that to make the complaint good the statute of the State of Illinois, if any exists, should have been set out with the complaint, to the end that the courts here might determine that such a proceeding was authorized by the laws of that State.

In the absence of any showing to the contrary, the presumption is that the common law prevails in the State of Illinois. *Robards v. Marley*, 80 Ind. 185 ; *Rogers v. Zook*, 86 Ind. 237 ; *Supreme Council v. Garrigus*, 104 Ind. 133.

With this presumption before us, we must presume, also, that the circuit court of Vermillion county, in the State of Illinois, is a common-law court, with all the powers, duties and jurisdiction attaching to such a tribunal. Such courts have jurisdiction to hear and determine actions for the recovery of debts, and it affirmatively appears from the complaint before us that this was an action of that kind. The court, therefore, had jurisdiction of the subject-matter of the action.

Had no attachment issued, no question of the power of the court to act would arise, but as an attachment proceeding was instituted in connection with the main action, it becomes necessary to inquire into the nature and origin of the writ of attachment.

The writ of attachment in this country is essentially the creature of statute law. Attachment proceedings are not

Cunningham v. Jacobs.

only utterly devoid of any of the features of the common law, but they are so far in derogation of common right that an appeal to this remedy has never been specially favored by the courts. Attachment amounts to the involuntary dispossession of the owner, prior to any adjudication to determine the rights of the parties. To some extent it is equivalent to execution in advance of trial and judgment. 1 Wade Attachment, section 2.

Ordinarily, attachment proceedings are commenced in aid of an action already pending, or at the time instituted, the object being to make the property available for the payment of any judgment the plaintiff may recover in the main action by seizing the property of the defendant and holding it until the rendition of such judgment. We may assume that such was the object sought to be attained in the suit in which the bond now involved was executed. The question, therefore, arises, did the circuit court of Vermillion county, in the State of Illinois, have jurisdiction to issue the writ of attachment and require the bond which is the foundation of this action?

In the case of *Board, etc., v. Markle*, 46 Ind. 96, it is said: "Any movement of a court is necessarily jurisdiction. * * 'If the law confers the power to render a judgment or decree, then the court has jurisdiction. What shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it.' * * 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other court.' * * 'Courts are established for the purpose of administering justice, and it is their duty, so far as they can discover the truth, to decide right. But the power to decide at all necessarily carries with it the power to decide wrong as well as right. In the present imperfect state of human knowledge, a power to hear and determine necessarily carries with it a power which makes the determination obligatory, without any reference to the question

Cunningham v. Jacobs.

whether it was right or wrong. If this were not so, the judgment or determination of any court would be of no particular value. It might be attacked or avoided at pleasure, upon the ground that the court or judge had committed an error.' ”

Assuming that the circuit court of Vermillion county had jurisdiction of the main action, let us suppose that the appellant in this case applied for a writ of attachment upon the ground that the Roman law was in force in the State of Illinois, and made a showing which would have entitled him to the writ under that law. If the court had decided that the Roman law was not in force in that State, and had refused the writ, presuming, as we do, that the common law prevailed there, we would have said that its decision was right. But conceding that it had the right to so decide carries with it the concession that it had the right to decide the other way. So again, by the customs of London, the creditor has, from time immemorial, possessed the right to sue out a writ of attachment against his debtor's property in certain cases. Suppose that the appellant had applied for an attachment against the property of the appellee, upon the ground that the customs of London constitute a part of the common law, and had made a showing which would have entitled him to the writ under such customs. If the court had decided that such customs constituted no part of the common law and had refused the writ, we would have held, doubtless, that such decision was correct. But if the court decided that such customs did constitute a part of the common law, and that they were in force in the State of Illinois, by what rule can it be said that we have the right to call in question the correctness of that ruling and now relieve the parties from the consequences of the error.

It is always to be presumed that everything was rightly done in court, unless the contrary expressly appears by the record ; and, as the contrary is not shown, we must presume,

Cunningham v. Jacobs.

we think, that the circuit court of Vermillion county, in the State of Illinois, did not exceed its jurisdiction.

In addition to what we have said upon the subject of jurisdiction to issue the writ of attachment, it is of importance that we should not omit the fact that it appears by the complaint in this action that the appellee appeared to the action in the State of Illinois, and upon a trial defeated the appellant.

Treating of the subject of jurisdiction, Mr. Drake, in his work on Attachment, section 87, says: "In this connection, therefore, importance attaches to the point whether the defendant was personally served with process in the action. If he was, or if he appeared to the action without service, the cause becomes mainly a suit *in personam*, with the added incident, that the property attached remains liable, under the control of the court, to answer such demand as may be established against him by the final judgment of the court. In such case, if he make no question of the right of the court to exercise jurisdiction over him by attachment, the proceedings, however defective the affidavit, will be valid; and the rights acquired through them will not depend on the attachment for their validity, but upon the judgment; which, in such case, can not be impeached in any collateral proceeding."

We are of the opinion, therefore, that we must presume that the circuit court of Vermillion county, Illinois, had jurisdiction in the proceeding in which the bond in suit was given. We are not at liberty, however, to presume the existence of a statute under which such bond was executed. If any such statute existed, it was the duty of the party desiring to avail himself of its provisions to bring it before the court in some legitimate mode. As this has not been done, the bond in suit must be treated as having been executed without any statutory authority. The question, therefore, is, is it good as a common-law bond?

Drake on Attachment, section 151, says: "Where a bond

Cunningham v. Jacobs.

is executed without being required or authorized by any statute, the makers can not defend against it on that ground; it is good as a common-law bond. This was ruled in an action on a bond, given by a plaintiff on commencing a suit by attachment in a circuit court of the United States, and the bond was made to the United States. No law of the United States requiring it, and not being executed in connection with any business of, or any duty of the obligors to, the government, it was contended that it could not be enforced; but the court determined otherwise. So, if the law require the bond to be approved by the court, but if it be approved by a judge in vacation, it is not, therefore, void, but is good as a common-law bond."

That such a bond is good as a common-law bond, see *Turner v. Armstrong*, 9 Bradwell, 24; *Sheppard v. Collins*, 12 Iowa, 570; *Barnes v. Webster*, 16 Mo. 258; *Williams v. Coleman*, 49 Mo. 325.

This case is to be distinguished from the cases of *Caffrey v. Dudgeon*, 38 Ind. 512, and *State, ex rel., v. Younts*, 89 Ind. 313, and kindred cases. In the case of *Caffrey v. Dudgeon, supra*, the justice who took the replevin bond had no jurisdiction of the subject-matter of the action, and hence all his acts in the case were void; while in the case of *State, ex rel., v. Younts, supra*, the sale by the commissioner was void, and did not divest the title of the relators, and it would have been manifestly unjust to permit the relators to recover the purchase-price of the land and retain the title. Furthermore, there was no consideration for the bond in that case, and so it could not be enforced as a common-law bond. Such is not the case as to the bond involved in this case. As we have seen, it was taken by a court having jurisdiction of the subject-matter of the action, and by means of such bond the appellant obtained the writ of attachment which he sought, under which the appellee was deprived of the possession of his property. In such case the party executing the bond is

Cunningham v. Jacobs.

estopped from denying its validity. *Harbaugh v. Albertson*, 102 Ind. 69.

In our opinion the bond now under consideration is a good common-law bond. Such being our conclusion, it follows that it was unnecessary to set out any statute under which it was taken, in order to maintain an action thereon.

. It is further contended that resort must be had to the statutes of the State of Illinois to determine what amounts to a breach of the bond, and to determine the measure of damages thereunder, and that, as this is true, no action can in any event be maintained thereon except in that State.

As we have reached the conclusion that this is a good common-law bond, it is unnecessary that we should decide what would have been the result had it been shown that it was taken under the provisions of some statute. As a common-law bond, the action upon it is governed by the rules applicable to actions on ordinary contracts. Suit upon attachment bonds, generally, is an action of debt in which it is necessary to aver in the complaint that the damages are due and remain unpaid. *Drake Attachment*, section 167; *Michael v. Thomas*, 27 Ind. 501; *Uhrig v. Sinex*, 32 Ind. 493.

In our opinion the complaint in this case states a good cause of action, and the court below did not err in overruling a demurrer thereto.

Judgment affirmed.

Filed Oct. 12, 1889.

No. 13,843.

RIETMAN ET AL. v. STOLTE.

MASTER AND SERVANT.—Negligence.—Machinery.—Patent Defect.—Assumption of Risk.—Contributory Negligence.—One who, being employed by another to assist in loading heavy timbers upon a car, can by looking see that the hooks attached to a crane used in the work are dulled and incapable of safely holding the timbers raised by it, but continues in the service without objection, will be deemed to have assumed the risk created by the defect, and can not recover for an injury resulting to him by reason thereof.

From the Vanderburgh Superior Court.

P. Maier, for appellants.

A. C. Tanner and *W. W. Ireland*, for appellee.

OLDS, J.—This is an action for damages resulting from an injury received by the appellee, Stolte, while at work for appellants loading timber upon a car. The complaint is in two paragraphs.

The first paragraph of the complaint alleges that the defendants, Henry Rietman and Charles Schults, are partners, doing business under the firm name of Rietman & Schults, and as such partners are running and operating a saw mill in Vanderburgh county, and are manufacturers of and dealers in lumber; that, on the 9th day of July, 1886, the plaintiff was in the employ of the defendants, working in and about their said mill; that under and by direction of the defendants, plaintiff was upon that day engaged in loading heavy timber from a wagon into a car for the purpose of transportation, and to lift said timber from the wagon to the car he used a crane belonging to the defendants; that attached to said crane, and as a part thereof, was an iron hook with which the timbers were grasped and held up while being lifted as aforesaid; that, on the day aforesaid, while engaged as aforesaid, and without any fault or negligence on his part, a heavy

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Rietman et al. v. Stolte.

oak timber, while being raised as aforesaid, slipped from the hook and fell upon and crushed both of the plaintiff's feet, whereby he suffered and endured great mental and physical pain and agony for a long time, and was by reason thereof unable to perform any work or labor for eight weeks, and incurred large expense in and about being cured; that, at the time the injury was inflicted, plaintiff was using due care and handling said crane in a careful, prudent manner, and said timber slipped from the hook and inflicted said injury wholly because said hook was defective and unfit for use for such purpose, in this, it was worn and the teeth thereof were dull and broken, so that it did not and could not securely hold said timber while the same was being lifted as aforesaid, and permitted it to slip and fall, which defective condition was at the time known to the defendants, but wholly unknown to the plaintiff. Prayer for judgment.

The allegations of the second count are like the first, except instead of charging the appellants with knowledge of the defect in the hook, it alleged that the "defective condition was at the time of said injury wholly unknown to the plaintiff, but the same might have been known to the defendants by the exercise of ordinary care."

To each paragraph of the complaint a demurrer was filed for want of sufficient facts. The demurrer was overruled, and exceptions taken. The issues were formed by an answer in general denial.

The jury returned a general verdict for the plaintiff, and assessed his damages at \$175.

Interrogatories were submitted to be answered by the jury, in case they found a general verdict, and the jury returned the following answers to interrogatories:

"1. For what particular work was plaintiff employed by defendants?

"Ans. He was employed for common labor.

"2. Could not plaintiff, by the use of ordinary diligence,

Rietman *et al.* v. Stolte.

have seen the defect in the hook fastened to the crane, if there was any?

"Ans. Yes, he could see it if he had looked at it.

"3. Was the hook defective which was attached to the crane?

"Ans. It was.

"4. If you answer the preceding interrogatory in the affirmative, will you state in what the defect consisted?

"Ans. The defect consisted in its being a dull hook.

"5. Did not plaintiff have as good an opportunity to see the defect, if any there was in the hook, as the defendants?

"Ans. Yes.

"6. How long did the plaintiff work with the crane to which the hook claimed to be defective was attached?

"Ans. About three weeks.

"7. Who told plaintiff to go on the car the morning he was hurt?

"Ans. Schaefer.

"8. Did defendants have any knowledge of any defect in the hook attached to the crane, used to load the car, the morning plaintiff was hurt?

"Ans. The defendants did not know of the defect at the time, but the defendants ought to have known it.

"9. If they had knowledge, how did they get it?

"Ans. They did not know it, but ought to have known it.

"10. Could not the plaintiff have avoided being injured had he used ordinary care and caution?

"Ans. No.

"11. In what capacity or position was John Schaefer employed?

"Ans. As a common laborer.

"ERNST DEUSBERG, *Foreman.*"

The defendants filed their motion for judgment upon the answers to interrogatories notwithstanding the general verdict, which was overruled, and exceptions taken, and this ruling of the court is one of the errors assigned.

Rietman *et al.* v. Stolte.

It is a well settled principle, which has been adhered to by this court, "that an employee who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby." *Jenney, etc., Co. v. Murphy*, 115 Ind. 566. That case was an action for damages resulting from a defective ladder which the employee of the company mounted to repair the line of the company, and the case was reversed upon the evidence.

The rule does not go to the extent of requiring the employee to search for latent defects in the machinery or appliances furnished him for use, but it does go the extent that the employee assumes the consequences resulting from such defects as are patent, and such as, by the exercise of ordinary diligence, and giving proper heed to the things that surround him, he would discover. *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18.

Under the allegations of the complaint in this case, a recovery is sought for an injury caused by reason of a defect in a hook attached to a crane used in taking timbers from wagons and placing them upon the cars; that the defective hook was the one which grasped each piece of timber as it was lifted from the wagon and transferred to the cars. From the very nature of things, and the use made of the hook, it was constantly exposed to the view of the employees engaged in transferring such timbers. It would be difficult to imagine a defect in a tool, or appliance, more exposed to view, or more easily discovered than the defect alleged in this case. The special findings of the jury show that the appellee had been engaged in the use of the crane and hook attached thereto for three weeks; that the appellee, by the use of ordinary diligence, could have seen the defect; that he could

Rietman et al. v. Stolts.

have seen it if he had looked at it; that the appellee had as good an opportunity to see the defect as the appellants; that the appellants did not know of the defect, but the jury say they ought to have known of it.

The answers to the interrogatories show these facts, viz: That the defect in the crane was one which was patent; that neither appellants nor appellee knew of it, but both might have known of it if they had looked; that the appellee had worked with the hook for three weeks, and could have seen the defect if he had looked at it. The special findings do not show that either of the appellants was about the crane, but the evidence shows that this work was under the control of a fellow-servant of the appellee. The rule of law we have stated requires one to exercise the faculties which he possesses, and if there is a patent defect in a tool or machinery used by him which he can see by looking, he must look, and unless some reasonable excuse is given he is guilty of negligence if he does not look. In this case the special findings show the defect to be one which the appellee would have known if he had exercised ordinary diligence, and given proper attention to his business and the things surrounding him, and that he was neglectful of his duty and of the things which surrounded him, and it was by reason of his own negligence that he did not know of the defect in the hook, and he is chargeable with having knowledge of such defect.

The court erred in overruling the motion for judgment upon the answers to interrogatories notwithstanding the general verdict, and for such error the cause must be reversed.

Taking the theory we do in regard to this question, it is unnecessary to pass upon the other questions presented.

Judgment reversed, at the costs of the appellee, with instructions to sustain the motion for judgment on the answers to interrogatories.

Filed Oct. 12, 1889.

Beardsley, Executor, v. Marsteller.

No. 13,758.

BEARDSLEY, EXECUTOR, v. MARSTELLER.

DECEDENTS' ESTATES.—Devastavit by Administrator.—A *devastavit* occurs when an executor or administrator wastes the assets of the estate, and consists of any act, omission or mismanagement by which the estate suffers loss; or a *devastavit* may result from the payment of claims which, by the exercise of diligence, the administrator might have ascertained to be unjust and illegal.

SAME.—Insolvent Estate.—Refunding Receipt.—Recovery upon.—Consideration.—Where an administrator pays to a creditor of the estate the full amount of his claim and takes a receipt containing an agreement to the effect that, in the event the estate is found to be insolvent, the creditor will refund to the administrator the amount received less the dividend to which he is entitled, there is no *devastavit*, the agreement is upon a sufficient consideration, and if the estate proves to be insolvent the administrator may enforce repayment.

From the Warren Circuit Court.

R. P. Davidson, for appellant.

F. B. Everett, for appellee.

MITCHELL, J.—This action was commenced by Nicholas Marsteller against George T. TenEyck, to recover money paid by the plaintiff, as administrator of the estate of A. J. Morley, deceased, on a claim which the defendant held against the above mentioned estate. Pending the suit the death of TenEyck was suggested on the record, and George T. Beardsley, executor of his estate, was substituted as defendant.

The special finding of the court presents all the facts material to be considered in determining the merits of the controversy. It is found that TenEyck had a claim amounting to \$1,368 against the estate of Morley, which had been duly allowed. Marsteller, as administrator, paid the claim in full, and took a receipt, to which was attached an agreement, the effect of which was that, if the estate turned out to be insolvent, TenEyck bound himself to refund to Marsteller the

Beardsley, Executor, v. Marsteller.

amount received, with interest from date, less the amount of any dividend which the claimant might be entitled to receive on his claim. Payment was made to TenEyck by the assignment of a sheriff's certificate of sale of certain real estate, which was part of the assets of the estate in the hands of the administrator, the same having been accepted by the former as cash. TenEyck realized the full face value of the certificate in money.

The estate of Morley was finally settled as insolvent, and the administrator discharged on the 1st day of April, 1885, the dividend or *pro rata* share of TenEyck on his claim being \$41.76. The latter refused upon demand to repay Marsteller according to his agreement. Conclusions of law in favor of the plaintiff below.

The appellant's position is, that the duties of an administrator are prescribed by statute, which requires him to settle the estate either as solvent or insolvent, and that the plaintiff had, therefore, no right to commit what was in effect a *devastavit* upon the estate, and rely upon an agreement with a third person for indemnity. Moreover, it is argued that the agreement to repay the money was without any consideration, since TenEyck received nothing more than the amount due him from the estate.

A *devastavit* occurs whenever an executor or administrator wastes the assets of the estate, and consists of any act, omission or mismanagement by which the estate suffers loss, or a *devastavit* may result from the payment of claims which, by the exercise of proper diligence, the administrator might have ascertained to be unjust and illegal. *Ayers v. Lawrence*, 59 N. Y. 192 (197). Any loss which results to an estate from the misapplication of funds by an executor or administrator, is to be made good without detriment to others. Payment of a just and legal claim against an estate is not, however, a *devastavit*, or wasting of the estate. If an executor or administrator, without exercising due care, pays a claim in full, when the estate is insolvent, he takes the chance of losing

Beardsley, Executor, v. Marsteller.

the excess over the amount which the claimant would have received in the dividend among creditors. The estate or the creditors can lose nothing, as the administrator must make the amount good out of his own pocket. When an administrator pays a just debt due from the estate to a creditor, the law raises no promise against the creditor to repay any part of the amount in case of a deficiency of assets. *Egbert v. Rush*, 7 Ind. 706. Hence it is settled that in the absence of an agreement to refund, an administrator who has paid money on account of a just debt can not recover it back, on the ground that, by reason of insufficient assets, not arising from their accidental destruction, loss or failure, it afterwards appears that he has made an over-payment by mistake, unless the mistake was induced by the fraudulent conduct of the creditor. *Carson v. McFarland*, 2 Rawle, 118; *Davis v. Newman*, 2 Rob. (Va.) 664.

The practice of taking refunding receipts is, however, a very old one, and we know of no authority which holds, nor of any reason for holding, that a creditor who has received payment in full, upon an agreement to refund, may repudiate his agreement, and leave the administrator to bear the loss. Such an agreement is not in violation of any statute, nor is it intrinsically wrong or immoral. It scarcely needs to be said that such an agreement is not without consideration to support it. The present case is not distinguishable in principle from *Wheeler v. Hawkins*, 116 Ind. 515, in which an agreement similar to that here in question was held valid and binding.

Other questions not affecting the merits are suggested, but they involve no error.

The judgment is affirmed, with costs.

Filed Oct. 16, 1889; petition for a rehearing overruled Dec. 17, 1889.

VOL. 120.—21

KINNINGHAM v. The State.

No. 15,153.

KINNINGHAM v. THE STATE.

CRIMINAL LAW.—Arson.—Attempt to Commit.—The statute relating to arson, R. S. 1881, section 1927, prescribes no penalty for an attempt to commit arson, and the offence defined is complete, and the penalty enforceable, only when property is actually burned.

From the Decatur Circuit Court

J. S. Scobey, for appellant.

ELLIOTT, C. J.—This case is here for the second time—*Kinningham v. State*, 119 Ind. 332. When it was here before, the appellant's contention was, that the indictment was bad, because it did not state the facts constituting the crime of an attempt to commit arson, and this contention we sustained. The point is made, on the indictment before us on this appeal, that the statute does not prescribe any penalty for an attempt to commit arson, and we are reluctantly driven to sustain the appellant's position on this question.

The statute is confused and lame. R. S. 1881, section 1927. The offence, really defined, is complete, and the penalty enforceable, only when property is actually burned; for, in one place, and that a controlling one, the provision is: "The property so burned being of the value of twenty dollars or upwards." The effect of this provision is to make it essential that property of the value of twenty dollars should be burned, for unless property of that value is actually burned, there is no offence which can be punished.

But there is another clause which must not be overlooked, and that is the one fixing the penalty, which reads thus: "And upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than one year, and fined not exceeding double the value of the property destroyed." It is impossible to escape the conclu-

Brown, Guardian, v. Marshall *et al.*

sion ~~that~~ the penalty can not be enforced unless some property has been ~~actually~~ destroyed, or injured, by fire.

There is no elasticity in statutes defining criminal offences, and their meaning can not be enlarged by construction, nor can the courts supply omissions; that can only be done by the Legislature. Where there is no penalty denounced for a statutory crime, none can be prescribed by the judiciary.

The judgment must be, and is, reversed.

Filed Oct. 15, 1889.

No. 14,464.

BROWN, GUARDIAN, v. MARSHALL ET AL.

DECEDENTS' ESTATES.—*Claim Against.*—*Action by Guardian to Set Aside Allowance.*—*Parol Partition of Land.*—*Evidence of.*—Where, in an action by a guardian to set aside a claim against the estate, evidence is introduced by the defendants relating to a parol partition of land by the deceased and others, which land is afterwards sold by the claimant to the deceased, the purchase-price constituting the claim, it is admissible.

EVIDENCE.—*Admissions of Witness in Chief.*—*Rebuttal.*—A plaintiff who has used a defendant as a witness in chief, can not afterwards introduce his admissions in rebuttal, and there is no abuse of judicial discretion in their rejection.

From the Grant Circuit Court.

A. E. Steele and J. A. Kersey, for appellant.

J. L. Custer, for appellees.

OLDS, J.—This is an action brought by the appellant, Thaddeus Brown, as guardian of Joshua A. Ladd, minor heir of Charles S. Ladd, deceased, against Charity Marshall,

Brown, Guardian, v. Marshall et al.

Eli B. Marshall, and the other appellees, to set aside the final report of said Eli B. Marshall as administrator of the estate of said Charles S. Ladd, deceased, and the allowance of a claim against said estate; also, to set aside the partition of real estate formerly owned by Samuel Ladd, the grandfather of said minor.

Issue was joined on the complaint, and a trial had resulting in a finding and judgment for the appellees.

The appellant filed a motion for a new trial, which was overruled, and exceptions taken. The overruling of the motion for a new trial is assigned as error.

The first question presented by the motion for a new trial, and contended for by counsel for the appellant, is that the finding of the court is not supported by sufficient evidence.

The rule is so well settled that this court will not reverse a case on the weight of the evidence that we need not cite authority to support it. We have examined the record, and find there is evidence sufficient to support the finding.

The next question is, the appellant contends that the court erred in overruling appellant's motion to strike out the testimony of certain witnesses in relation to a parol partition of certain real estate between the widow and heirs of Samuel Ladd, deceased, which they inherited from said Samuel, the said Charles S. Ladd, deceased, being one of the heirs.

It is alleged in the complaint, and contended by the appellant, that appellee Eli B. Marshall, as administrator of the estate of Charles S. Ladd, and Joshua Marshall, while said Joshua was the duly appointed and acting guardian of the plaintiff's ward, colluded together and procured the allowance of a pretended mortgage debt to said Joshua, amounting to something over two thousand dollars. And, upon behalf of the defendants, it is claimed that said claim was just, due, and owing to the said Joshua, and was properly allowed by the court; that Samuel Ladd died owning two hundred acres of land in Grant county, leaving surviving him, as his only heirs at law, his widow, Charity Marshall, and four chil-

Brown, Guardian, v. Marshall *et al.*

dren, viz., Cicero, Isabella, Ruth C., and said Charles S.; that, after his death, the children became the owners of forty acres more land; that Cicero died in 1873, and after his death the widow and other children made a parol partition of all of said land, a portion being set apart to each, a portion being set off to said Charles S., with the agreement that he should support his mother, and that they each took possession of their respective tracts; that afterwards Ruth and her husband, William R. Marshall, one of the appellees, sold the portion they were to have by the partition to Joshua Marshall, and Joshua Marshall sold a portion of the land so purchased by him to said Charles S. Ladd for the sum of \$1,650, and by the direction of Joshua, Ruth and her husband conveyed that part of the land set apart to her, and purchased by Charles S. of Joshua Marshall, direct to Charles S., instead of conveying the same to Joshua, and Charles S. executed a mortgage on the same to said Joshua Marshall for \$1,650, the purchase-price, and that said mortgage was unpaid at the time of the death of Charles S., and was the mortgage debt which Joshua Marshall filed against the estate of said Charles S. after the said Eli B. Marshall was appointed administrator of his estate, and was allowed by the court, at the time it was allowed amounting to over \$2,000, and the court permitted testimony to be introduced relating to the parol partition of the land. In this there was no error.

The only other alleged error assigned and discussed was the refusal of the court to allow a witness to testify to a statement of Charity Marshall, in which she said that "there was never any division of the Samuel Ladd land except the one in which she got twenty-eight acres set off to her on the south side; that she was sure of it; if there had been she would certainly recollect it."

Appellant had used said Charity as a witness in chief, and then appellant offered to make this proof after. Under the rules of practice, and the regular order of conducting trials, the evidence had closed, and it was after appellant had put one of

Brown, Guardian, v. Marshall *et al.*

the witnesses, by whom he proposed to make this proof, on the witness-stand in rebuttal, and he had testified that said Charity had "said no such partition had been made," and said Charity had been called as a witness and explained the statement. At this stage of the case the admission of such evidence was within the discretion of the court, and there was no abuse of discretion in rejecting it.

Counsel have gone into minute details of the history of the case and made an extended argument in the cause. They discuss the irregularity and validity of the mortgage debt in favor of Joshua Marshall, allowed by Eli B. Marshall, as administrator of Charles S. Ladd, and the various transfers of the land, but if the debt was a valid and just one, and the sales and transfers of the land were made in good faith and for the best interest of the ward, the allowance of the claims and transfers will not be set aside for mere irregularities in the allowance of the claim, or by reason of the relations of the parties. Evidence was introduced tending to prove the legality and justness of the mortgage claim allowed, and the good faith characterizing the transaction, and the court trying the cause has passed upon the evidence and found for the appellees, and this court will not disturb the finding. We find no error in the record.

Judgment affirmed, with costs.

Filed Oct. 15, 1889.

Hogshead, Administrator, v. The State, *ex rel.* Allen, Guardian.

No. 14,638.

**HOGSHEAD, ADMINISTRATOR, v. THE STATE, EX REL.
ALLEN, GUARDIAN.**

GUARDIAN AND WARD.—*Mortgage.*—*Purchase of Mortgaged Land.*—*Conversion.*—*Action on Bond.*—Where a guardian, on his own account, purchases land upon which he holds a mortgage to secure a loan of his ward's money, and agrees, as the purchase-price, to pay the debt due to the ward, such debt, as between the vendor and the guardian, is paid, and an action therefor will lie upon the guardian's bond as for a conversion.

SAME.—*Satisfaction of Mortgage.*—*Priority of Liens.*—Where the guardian, in such case, after taking a conveyance of the land, enters the trust mortgage satisfied, in order that he may negotiate a new mortgage loan upon the land, the ward is not bound to institute a proceeding to establish the priority of the trust mortgage as against the new mortgagee, but may sue upon the guardian's bond for conversion.

NEW TRIAL.—*Actions on Contract.*—*Amount of Recovery.*—In actions upon contract, an assignment as a cause for a new trial that the damages assessed by the jury are excessive, does not call in question the amount of the verdict.

From the Daviess Circuit Court.

W. R. Gardiner and *S. H. Taylor*, for appellant.

J. W. Ogdon, *M. F. Burke*, *J. C. Billheimer* and *J. Downey*, for appellee.

COFFEY, J.—On the 7th day of August, 1875, Nelson Purcell was duly appointed guardian of the person and property of Margaret E. Wallace, a minor, and executed his bond as such in the penal sum of twelve hundred dollars, with David Hogshead as surety. David Hogshead, the surety on said bond, departed this life, intestate, on the 13th day of June, 1879, and his estate is now in process of settlement in the Daviess Circuit Court. Nelson Purcell was removed from his trust as such guardian by the Daviess Circuit Court, and the appellee herein, John Allen, was duly appointed and qualified in his stead. The appellee filed the claim now

120	327
129	84
120	327
145	265
120	327
180	643

Hogshead, Administrator, v. The State, *ex rel.* Allen, Guardian.

in controversy, basing it upon the guardian's bond, executed by the said Nelson Purcell and David Hogshead, and alleging, as a breach of said bond, that prior to the 15th day of October, 1881, the said Nelson Purcell, as guardian, converted to his own exclusive use and benefit the moneys which came into his hands as such guardian, the sum of \$750, and has never accounted for the same, or any part thereof, to the said Margaret E. Wallace, or any other person.

A trial of the cause, before a jury, resulted in a verdict for the appellee in the sum of \$885.54, upon which the court rendered judgment.

The error assigned is, that the circuit court erred in overruling the appellant's motion for a new trial.

The undisputed facts in the case are, that, on the 9th day of August, 1875, Nelson Purcell was duly appointed guardian of the person and property of Margaret E. Wallace, in Daviess county, and executed a bond as such in the usual form, with David Hogshead as his surety; on the same day he loaned to Hiram Purcell \$544 of his ward's money, at ten per cent. interest, and took a mortgage on real estate in Daviess county to secure the repayment of the same; forty-four dollars of the principal of this loan was subsequently repaid to the guardian. Hiram Purcell and his wife conveyed the land thus mortgaged to Barnetta Mattingly on the 24th day of February, 1876, she assuming and agreeing to pay \$500 of the mortgage debt. On the 22d day of January, 1879, Barnetta Mattingly conveyed the land to Nelson Purcell, the guardian, the sole consideration for such conveyance being his agreement with her to pay off the mortgage debt above named. David Hogshead departed this life on the 13th day of June, 1879, and on the 1st of October, 1881, the guardian reported this fact to the Daviess Circuit Court, and filed a new bond to the approval of said court. Nelson Purcell, the guardian, having negotiated a loan of money from the *Ætna* Life Insurance Company upon the land mortgaged to him to secure the debt due to his ward, and

Hogshead, Administrator, v. The State, *ex rel.* Allen, Guardian.

other lands, on the 10th day of December, 1883, entered the mortgage satisfied of record. On the 7th day of December, 1885, Nelson Purcell was removed from his trust as guardian by the Daviess Circuit Court, and the appellee appointed as his successor in the trust. Upon these facts the court instructed the jury as follows :

“ It is the duty of the guardian to preserve the identity, as well as the existence, of the fund under his control ; and if a guardian invest the money of his ward in his hands in his own business, or the business of others in which he has an interest, it is a conversion of money for which he will be liable on his bond.

“ 2. The selling, bartering, or assigning away of the property of his ward, including choses in action, by the guardian for his own use, is a conversion of his ward's assets for which he is liable.

“ 5. If the jury find, from a preponderance of the evidence, that Nelson Purcell was duly appointed guardian of Margaret E. Wallace, and executed his bond as such, and that the decedent, David Hogshead, executed such bond as surety for said Purcell in that behalf, which bond was duly approved, and that money or other property of said ward came into the hands of said Purcell as such guardian ; and you further find that said Purcell, as such guardian, loaned the money of his ward to Hiram Purcell and took a mortgage from him on certain real estate as security for said loan, and before the payment of said mortgage Nelson Purcell bought the land so mortgaged, and took the deed to himself in his own name, and, as a part of the consideration for such purchase, promised and agreed to pay said mortgage, and that he took possession of said land and converted it to his own use, and failed to pay said mortgage to his ward, or any other person authorized to receive it, and that such conversion was made when the decedent, David Hogshead, was surety on the bond, and before a new bond was executed by

Hogshead, Administrator, v. The State, *ex rel.* Allen, Guardian.

Purcell, then and in that case you should find for the plaintiff.

"6. If you find for the plaintiff, and that Nelson Purcell, as guardian, converted to his own use the funds of his ward, as above stated, you will assess the plaintiff's damages at the amount so found to be converted, with six per cent. interest from the date of the conversion, together with ten per cent. damages thereon."

To the giving of each of these instructions the appellant excepted, and assigned the same as reasons for a new trial.

By these instructions we think the question is fairly presented as to whether the facts above set out amount to a conversion to his own use of the ward's money by Nelson Purcell, the guardian.

In the case of *State, ex rel., v. Sanders*, 62 Ind. 562, it was said by this court: "It is the duty of the guardian to loan, or otherwise invest, the money of his ward in his hands, in such a way as to keep it all the time at interest, as far as practicable, and to use due care in making such loans or investments; he is not permitted to use such money for his own benefit, or to make any profit out of it for himself. * * The rule in that respect is very strict. Guardians, and all other trustees of the moneyed concerns of others, are answerable for any mismanagement or unauthorized dealings with the trust moneys in their hands, and any misapplication of such moneys is a conversion of them, within the meaning of the statute relating to guardians. * * It is their duty to preserve the identity as well as the existence of the funds under their control. If they destroy the fund, they render themselves responsible for it at once. If they pay away the money as their own, the trust is practically at an end. * * The investment of the money in his hands, by a guardian, in his own business, or in the business of others in which he has an interest, as a mere business investment, is a conversion of the money for which he is liable on his bond."

Hogshead, Administrator, v. The State, *ex rel.* Allen, Guardian.

See, also, *Covey v. Neff*, 63 Ind. 391 ; *Lowry v. State, ex rel.*, 64 Ind. 421.

In this case, as we have seen, Barnetta Mattingly conveyed the land upon which the guardian held a mortgage to secure a debt due to the ward to the guardian, in consideration of his promise to pay the debt secured by the mortgage. As between Barnetta Mattingly and the guardian, the debt was satisfied. She placed in the hands of the guardian funds with which he agreed to satisfy the debt due to the ward. To all intents and purposes, he used the debt due to his ward to purchase land for his own benefit, taking the title to himself. In such case he is held in equity to have received the funds for the use of the party for whose benefit the contract was made, and is a trustee holding such funds for the use of the *cestui que trust*. *Miller v. Billingsly*, 41 Ind. 489 ; *Beals v. Beals*, 20 Ind. 163 ; *Cross v. Truesdale*, 28 Ind. 44 ; *Durham v. Bischof*, 47 Ind. 211.

It is true that, as to the ward, Hiram Purcell and Barnetta Mattingly were not discharged ; but they were liable as sureties only for the guardian.

The case then is this : The guardian purchased the land upon which he held a mortgage to secure money due to his ward, agreeing, as the purchase price, to pay the debt due to the ward. As between him and his vendor the purchase price is paid. The debt due to the ward represents that price. So far as the guardian is concerned the debt is paid. The guardian owes the debt to his ward. In what does the case differ from one where the guardian had collected the money and had then invested it in the land ? In either case he is indebted to his ward in the sum which represents the purchase-price of the land. We think it ought to be held that he has converted the debt due to his ward to his own use.

It is claimed that the ward might still enforce the mortgage against the land, and have it declared preferred to the

Hogshead, Administrator, v. The State, *ex rel.* Allen, Guardian.

mortgage executed to the *Ætna Life Insurance Company*, and for that reason the ward has lost nothing.

Whether the mortgage in favor of the ward could be enforced as against the insurance company, depends upon whether that company had notice of the facts in the case. We do not think the ward should be compelled to litigate the question with that company. As the guardian has treated the debt due his ward as paid, and has entered the mortgage satisfied, neither he nor his surety should be heard to complain when required to answer to the ward for the debt thus admitted by the guardian to have been paid.

It is further claimed by the appellant that the court erred in its fifth instruction, in assuming that a person could convert land to his own use; but it is evident from the instructions, taken as a whole, that the word "converted," as used in this instruction, was not used in its technical sense. It was used in the sense of "appropriate," and was doubtless so understood by the jury. We are of the opinion that the instructions given by the court stated the law correctly, and that the court did not err in giving them.

It is also claimed by the appellant that the court erred in the admission of evidence on the trial of the cause, but we find in the record no objection or exception to the admission of evidence.

It is also contended that the verdict and judgment are too large.

The reason assigned for a new trial was, that the damages assessed by the jury were excessive. This being an action on contract, the assignment as a cause for a new trial that the verdict is excessive, does not call in question the amount of such verdict. *McKinney v. State, ex rel.*, 117 Ind. 26; *Smith v. State, ex rel.*, 117 Ind. 167.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed Oct. 15, 1889.

Robertson et al. v. Robertson et al.

No. 13,795.

ROBERTSON ET AL. v. ROBERTSON ET AL.

WILL.—Widow.—Life Estate.—Limited Power of Disposition.—Trust Estate.—Accounting Among Heirs.—Descent.—A testator devised all of his real and personal property to his wife for life, with remainder over to his children, share and share alike. The widow was given power, as executrix, to sell any or all of the property to pay debts or to make advancements, and it was provided that whatever of the estate remained in her hands at her death should be equally divided among the testator's children, taking advancements into consideration. The widow sold part of the estate and loaned of the proceeds a large sum to two of the sons, they agreeing to account to the other children at her death. These sons also came into possession of other property belonging to the estate. The widow died, never having qualified as executrix, and no letters of administration were ever issued on the testator's estate.

Held, that as the widow had a power of disposition only for defined purposes and as executrix, the part of the estate which was not applied to such purposes, constituted, aside from rents and profits and interest and income, a trust fund for the benefit of all the children, and an action will lie by the other children against the sons to enforce an accounting.

Held, also, it appearing that there are no debts, that the account between the heirs may be adjusted by a court of equity without the intervention of an administrator.

Held, also, that as, by the terms of the will, the children were given the same interest in the testator's property that they would have taken without the will, they are considered as taking by descent.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan and J. P. Baker, for appellants.

W. P. Rogers and J. E. Henley, for appellees.

MITCHELL, J.—This suit has arisen out of a controversy between the heirs of James D. Robertson, who died testate on the 8th day of April, 1867, leaving his widow, Mary A. Robertson, and seven children surviving.

The testator devised and bequeathed to his widow all his real and personal property, to be held and enjoyed by her

120	333
128	633
120	333
141	184
120	333
158	291

Robertson et al. v. Robertson et al.

during the period of her natural life, with remainder over to his children, share and share alike. The widow was appointed executrix of the will, with power, in case it became necessary to pay debts, or to make advancements to any of the children, to sell any or all of the real or personal estate at private sale, or in such manner and upon such terms of credit as she might think proper, and to execute conveyances to the purchasers in fee simple. The will provided that whatever real or personal estate remained in the hands of the widow at her death should be equally divided, share and share alike, among the testator's children then living, and the descendants of such as were then dead, taking into consideration all advancements made by the testator or by his widow. The widow elected to take under the will, and it is alleged that she advanced various sums to the children respectively. It also appears that she sold a large part of the estate, and loaned of the proceeds sums amounting to five thousand dollars to two of the sons, Charles T. and Walter Robertson, which they agreed should be accounted for to the other children at her death, and that, during the lifetime of their mother, and since, the sons above named came into possession of property and money belonging to the estate, of the value of five thousand dollars, in addition to the amount loaned them, which it is alleged they still retain. It is alleged that during the lifetime of their mother, Charles T. and Walter sold and carried away from the real estate devised by the testator large quantities of stone and timber, said to be of the value of three thousand dollars, the proceeds of which they retain, and that after the death of their mother they entered upon the real estate remaining unsold and appropriated the rents and profits.

It appears that the widow died in 1885, never having qualified as executrix, and that no letters of administration ever issued upon the testator's estate. The debts had all been paid. Three of the children died after the death of the testator and during the lifetime of the widow. This action was

Robertson et al. v. Robertson et al.

brought by the surviving brothers and sisters, and the descendants of those who have died, against Charles T. and Walter Robertson, to compel them to account for the property received by them, which it is alleged they hold in trust for the plaintiffs. The court sustained a demurrer to the complaint.

The will vested in the widow an estate for life in her own right, in all the real and personal estate of the testator, with the power as executrix to sell the whole or any part thereof, in either of two contingencies: 1. She had power to sell and convey in the event it became necessary to do so in order to pay debts; or, 2. In case she saw fit, in her discretion, to make advancements to the testator's children.

The widow had no general unlimited power of disposition, as devisee or legatee. Whatever power was committed to her in that respect was given her as executrix of the will, for defined purposes, and the case is not therefore influenced by the rule which obtains where a devise or bequest is made to one for life, coupled with a general unlimited power of disposition.

Where the devisee of a life-estate has an unqualified right to sell, with the power of spending the proceeds at pleasure in his lifetime, or of disposing of it by will, there is obviously no ascertained part upon which a trust can attach, and the power to sell is construed, in the absence of a bequest over, as indicating an intention on the part of the testator to create an absolute estate in fee. *Tower v. Hartford*, 115 Ind. 186; *Van Gorder v. Smith*, 99 Ind. 404. Even though there be a devise over, an absolute power of disposition may create an absolute estate in the first taker, if the power of disposition is plainly inconsistent with the purpose to create an estate for life. The power of disposition in the present case having been conferred upon the widow in her character as executrix, and in order to enable her to accomplish certain purposes, having no relation to her own benefit, her estate was not enlarged by the power so as to make it absolute. By

Robertson et al. v. Robertson et al.

the terms of the will the widow was entitled to the rents and profits of the real estate, and to the use, interest, and income from the personal estate during her natural life. These were at her disposal absolutely during her lifetime, and what remained in her hands, if derived from the sources above, at her death became part of her estate, to be disposed of according to law.

If she sold any property derived from the estate, the proceeds remaining, after paying the debts of the testator, and making advancements to his children, constituted a trust fund for the benefit of the latter. *Anderson v. Crist*, 113 Ind. 65, and cases cited; *Beshore v. Lytle*, 114 Ind. 8.

The children of the testator took by inheritance or descent from their father, because by the terms of the will they were given precisely the same interest and estate in his real and personal property as they would have taken if the particular devise or bequest to them had been entirely omitted from the will.

The rule is that if without the devise or bequest the heir would take exactly the same estate or interest which the will purports to give him, he is to be considered as having taken by descent, and not by purchase or under the will. *Stilwell v. Knapper*, 69 Ind. 558.

A mere alteration as to the time of the heir coming to the estate does not create such a difference in point of estate as to prevent him from taking by descent. *Scott v. Scott*, 1 Eden, 458; *Davidson v. Koehler*, 76 Ind. 398.

Whatever interest or estate the widow took in the remainder over, she took in trust for certain purposes, and whatever remained at her death, aside from what accrued from rents and profits, or interest and income, and what she may have inherited from the children who died during her widowhood, constituted a trust fund, which the law cast upon all the testator's heirs, share and share alike. It follows that so far as the defendants were in possession of the trust estate, or were indebted to the fund, they were subject to be

State, *ex rel.* Long, Pros. Att'y, v. Brownstown and River Valley G. R. Co.

called to account by the other heirs. The complaint shows that they had borrowed from their mother five thousand dollars, the proceeds of sales made of property held in trust by her, which they agreed to account for to the other heirs at her death, and that other funds belonging to the trust had come to their possession, which they retain. It appears that there are no debts, and that the entire account between the heirs may be adjusted upon equitable terms by a court of equity. It is settled that where there are no debts, and nothing besides to be done, the account may be adjusted between the heirs without the expense of an administrator. *Salter v. Salter*, 98 Ind. 522, and cases cited; *Gale v. Corey*, 112 Ind. 39, and cases cited.

The complaint states facts sufficient to constitute a cause of action for an accounting in relation to the matters pertaining to the trust, and it was error to sustain the demurrer to the complaint.

The judgment is reversed, with costs.

Filed Oct. 15, 1889.

No. 13,777.

THE STATE, EX REL. LONG, PROSECUTING ATTORNEY, v.
THE BROWNSTOWN AND RIVER VALLEY GRAVEL ROAD
COMPANY.

CORPORATION.—*Gravel Road.—Forfeiture of Charter.*—Where a gravel road company undertakes by its articles of association to construct a road nine miles in length and builds but six, by the provisions of section 3641, R. S. 1881, it forfeits its right only to the unconstructed part, and retains all the rights and privileges conferred by the statute as to the remaining part.

VOL. 120.—22

State, *ex rel.* Long, Pros. Att'y, v. Brownstown and River Valley G. R. Co.

SAME. — Failure of Directors to File Report.—The failure of the directors to file a report with the Secretary of State does not work a forfeiture of the charter.

From the Jackson Circuit Court.

D. H. Long, Prosecuting Attorney, and *D. A. Kochenour*, for the State.

J. F. Applewhite and ——— *Applewhite*, for appellee.

ELLIOTT, C. J.—This action is prosecuted by the State on the relation of Daniel H. Long, prosecuting attorney, and the object is to secure the forfeiture of the charter of the appellee. It is charged in the information that articles of association were filed in the proper recorder's office in March, 1875; that possession was taken of a public highway leading from Brownstown for a distance of nine miles, and that the appellee assumed and undertook in its articles of association to construct a gravel road for that distance. It is averred that the company has completed only six miles of the road, and, instead of constructing nine continuous miles of road it has constructed only six miles of road, and has not reached any one of the four places beyond Brownstown mentioned in the articles of association. It is also charged that the directors have failed to file any report with the secretary of state.

The statute provides that "Every such company or association shall cease to be a body corporate if, within two years from the time of filing a copy of its articles of association with the county recorder, it shall not have commenced the construction of its road, and expended at least ten per cent. of its capital stock, and if, within four years from such time, such road shall not be completed: *Provided, however*, That if it should so happen that such company should fail to complete the whole of its road within four years, then, in that case, all the rights, privileges, and franchises conferred by this act upon such company shall be applicable to and be the charter of such company for so much of its road as may be

State, *ex rel.* Long, Pros. Att'y, v. Brownstown and River Valley G. R. Co.

completed within four years, as fully and effectually as if the whole line were completed: *Provided*, That within six months after such road shall have been completed, the directors shall report such fact, together with the costs of construction, to the secretary of state." R. S. 1881, section 3641.

It is quite clear that the failure to construct the entire line does not forfeit the right to the part actually constructed, for the statute expressly provides that the rights and privileges conferred shall be restricted to the part actually completed. If there were doubt as to the construction of the statute it must be so resolved as to avert a forfeiture if it can be reasonably done, for statutes are liberally construed to prevent forfeitures in such cases as this. *Moore v. State, ex rel.*, 71 Ind. 478; *Sellers v. Beaver*, 97 Ind. 111; *Board, etc., v. Center Tp.*, 105 Ind. 422.

The subsequent legislation does not change the rule prescribed in the statutory provision we have quoted, for it simply grants further time for the construction of gravel roads. The effect of the provisions contained in section 3667, and in the act of December 20th, 1865, is simply to preserve the rights of the corporations who complete their roads within the time designated to the entire line described in the articles of association, and these provisions in no wise impair the right to the part of the road actually completed under the provisions of the statute we have quoted.

Pursuing the line marked out by the previous decisions of this court, we think it must be held that the failure of the directors to file a report with the secretary of state did not work a forfeiture of the appellee's corporate existence. *Moore v. State, ex rel., supra*; *State, ex rel., v. St. Paul, etc., T. P. Co.*, 92 Ind. 42; *State, ex rel., v. Crawfordsville, etc., T. P. Co.*, 102 Ind. 283.

Judgment affirmed.

Filed Oct. 16, 1889.

No. 13,895.

KELLEY ET AL. v. ADAMS ET AL.

PLEADING.--*Complaint.*--*Joint Action.*--*What Must be Shown.*--In a joint action based on section 2442, R. S. 1881, relating to the liability of heirs a complaint which fails to show a cause of action in favor of all the plaintiffs is bad.

ARBITRATION.--*Agreement to Arbitrate.*--*Not Entered of Record.*--*Nunc Pro Tunc Entry.*--An agreement to submit all matters in issue to arbitration, made in the presence of the court, but not entered of record, is not a perfected agreement, for the court can speak only by its record, and a *nunc pro tunc* entry can not be resorted to, to correct it.

SAME.--*Parol Agreement.*--At common law, an agreement to arbitrate, and the award thereon, in parol was valid, and notwithstanding the statutory provision in regard to arbitrations, the rules of the common law are still in force.

SAME.--*Guardian and Ward.*--A guardian at common law could agree to an arbitration for his ward.

From the Knox Circuit Court.

E. Callahan, J. T. Beasley, A. B. Williams, W. A. Cullop and G. W. Shaw, for appellants.

J. C. Chaney and G. G. Riley, for appellees.

BERKSHIRE, J.--This was an action instituted in the Sullivan Circuit Court by the appellants against the appellees, to compel them to account for moneys claimed to be due the appellants from their deceased grandfather, who had been their guardian.

The action rests on section 2442, R. S. 1881. There was a trial and judgment for the appellees in the court below.

The errors assigned are as follows: (1) The court erred in overruling the motion to strike out the second paragraph of the supplemental answer. (2) The court erred in overruling the demurrer to the amended first paragraph of supplemental answer. (3) The court erred in overruling the demurrer to the second paragraph of supplemental answer.

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Kelley et al. v. Adams et al.

(4) The court erred in overruling the demurrer to the amended first and to the second paragraph of the supplemental answer.

The appellees assigned one cross error, to wit: The court erred in overruling the demurrer to the complaint.

The answers to which the errors assigned by the appellants refer, are misnamed in the record; they are not supplemental to the original answers, but independent and additional, and should have been styled additional paragraphs of answer.

It is alleged, in substance, in the first paragraph, as amended, that on the — day of January, 1887, while said cause was pending, by agreement the court referred said cause to Wm. H. DeWolf, Esq., an attorney of said court, with authority to hear the evidence the parties might introduce and make a finding of facts, together with his conclusions of law, upon the issues joined and report the same to the court, and that such finding should be entered of record by the court in all respects the same as though the said cause had been tried by the judge of said court in open court; that subsequently, and on the — day of January, 1887, the parties appeared before the said DeWolf by attorneys, and pursuant to said agreement a trial was had of said cause, conducted in all respects as equity causes are tried, in the Knox Circuit Court, and the merits of said cause fully heard; that by the terms of the said agreement the finding of the said DeWolf was to be made in parol and then entered of record, and that he made a parol finding upon the issues in the presence of the attorneys engaged in said cause, and in open court in the presence of the judge of said court, but by inadvertence the same was not by the judge entered upon the docket at the time nor since; that the attorneys for the appellants object and refuse to allow the entry of the finding and the judgment to be made by said judge as agreed upon. Then follows a prayer that the appellants be not allowed to prosecute their suit, and that said finding and a

Kelley et al. v. Adams et al.

judgment be entered as of the — day of January, 1889, for the defendants.

The substance of the second paragraph is as follows : That heretofore, to wit, at the January term, 1887, of said court, the parties mutually agreed to submit all of said issues in said cause to arbitration, the same to be heard and tried before Wm. H. DeWolf, Esq., an attorney of said court; that pursuant to said agreement the same were heard and tried before said DeWolf; that all the evidence was heard by him, as arbitrator, in said cause, and he found the issues in said cause in favor of the appellees and against the appellants. Wherefore the appellants should not recover, etc.

The complaint is evidently bad, for the reason that it fails to aver that Mason Callahan was, within six months preceding the final settlement of the estate of William G. Adams, the testator, either an insane person, an infant, or had been without the State of Indiana.

We are inclined to the opinion that the complaint is sufficient in this regard as to the appellant guardian.

It is alleged, as preliminary to the statement of facts relating to the indebtedness, that the wards are the minor heirs, etc. But the action is brought by the appellants jointly, and, under the many decisions of this court, the complaint is bad, because it fails to show a cause of action in favor of all of the appellants. *Nave v. Hadley*, 74 Ind. 155; *Schee v. Wiseman*, 79 Ind. 389; *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; *Brumfield v. Drock*, 101 Ind. 190.

It was necessary to a good complaint that the facts alleged bring the case clearly within the provisions of section 2442 as to all of the parties. *Rinard v. West*, 48 Ind. 159; *Cincinnati, etc., R. R. Co. v. Heaston*, 43 Ind. 172; *Leonard v. Blair*, 59 Ind. 510; *Stevens v. Tucker*, 73 Ind. 73; *Gould v. Steyer*, 75 Ind. 50; *McCurdy v. Bowes*, 88 Ind. 583; *Rinard v. West*, 92 Ind. 359.

The complaint was only technically bad as to the guardian, and the infirmity that existed as to the other appellant was

one which could have been overcome by amendment, therefore we feel that we should consider the answers, notwithstanding the rule that a bad answer is good enough for a bad complaint.

The first paragraph of the answer is bad for several reasons.

It is alleged that the agreement was made in the presence of the court, and was to be entered of record. The court can only speak by its record, and until the agreement as alleged was entered of record it was not a perfected agreement. *Dennis v. Heath*, 11 Smé. & M. 206 (49 Am. Dec. 51).

The court could take no notice of the agreement alleged until the parties called its attention thereto for its action, and it is not alleged that this was ever done. *Nunc pro tunc* entries relate to omitted proceedings of the court. Such proceedings not having been entered of record at the proper time are made now for then. But the purpose of the answer is not to obtain the benefit of an amended record as to past proceedings of the court, but by proof of extraneous facts to establish a record of proceedings which the appellees claim ought to have occurred, but never did occur. *Raymond v. Smith*, 1 Metcalfe, 65 (71 Am. Dec. 458), is very much in point. *Gibson v. Chouteau*, 45 Mo. 171 (100 Am. Dec. 366).

The learned judge delivering the opinion in the former case says: "It is true, as argued by the appellants, the record may be amended in certain cases; but there must invariably be something to amend by. The effort in this case is not, however, to amend the record, but actually to establish a record which has no existence, by proof of extraneous facts."

The court could not amend its record because there was nothing to amend by. *Williams v. Henderson*, 90 Ind. 577; *Chissom v. Barbour*, 100 Ind. 1; *Johnson v. Moore*, 112 Ind. 91; *Makepeace v. Lukens*, 27 Ind. 435; *Schoonover v. Reed*, 65 Ind. 313.

We are inclined to the opinion that the second paragraph was a good answer. Notwithstanding our statutory provis-

Kelley et al. v. Adams et al.

ions in relation to arbitrations, the rules of the common law relating thereto are still in force. At common law there might be one or more arbitrators, and the agreement thereto and the award rest wholly in parol. *Dilks v. Hammond*, 86 Ind. 563; *Webb v. Zeller*, 70 Ind. 408; *Miller v. Goodwine*, 29 Ind. 46; *Sanford v. Wood*, 49 Ind. 165.

The award when made could be pleaded in bar of an action upon the original claim. *Walters v. Hutchins*, 29 Ind. 136; *Indiana Ins. Co. v. Brehm*, 88 Ind. 578.

There has been some controversy as to whether an agreement to submit to arbitration when a suit is pending had the effect to discontinue the action, but the weight of authority and of reason seem to be that it does not. *Nettleton v. Gridley*, 21 Conn. 531; *Lary v. Goodnow*, 48 N. H. 170; *Paulison v. Halsey*, 38 N. J. L. 488.

There is no doubt, we think, but what at common law a guardian could agree to an arbitration. *Hutchins v. Johnson*, 12 Conn. 376 (30 Am. Dec. 622, and note); *Strong v. Beroujoin*, 18 Ala. 168; *Weston v. Stuart*, 11 Maine, 329; *Smith v. Kirkpatrick*, 58 Ind. 254; *Morse Arb.* 25; *Caldwell Arb.* 24.

We think the judgment should be reversed, at the costs of the appellants, as the first error committed by the court was in overruling the demurrer to the complaint. *McCole v. Loehr*, 79 Ind. 430.

Judgment reversed, at the costs of the appellants, back to the filing of the demurrer to the complaint, and the court below is instructed to sustain the demurrer to the complaint, and to grant appellants leave to amend.

Filed Oct. 16, 1889.

 Peck v. Sims.

No. 13,687.

PECK v. SIMS.

REAL ESTATE.—Description.—Judicial Notice.—Judicial notice is taken that land in this State described as “the east half of the southeast quarter of section 22, township 23 north, range 10 east,” is not a fractional eighty-acre tract of land.

SAME.—Indefinite Description.—Void Sale.—A sale of real estate by the following description, viz., “the fractional east half of the southeast quarter of section 22, township 23, range 10 east, containing sixty-one acres more or less, in Blackford county, Indiana,” is void, the description being too indefinite to furnish the means of identifying the land.

SAME.—Deed to Land Adversely Held.—Action to Recover.—Statute Construed.—Section 1073, R. S. 1881, providing that any person having a right to recover possession of or quiet title to real estate in the name of another, shall have a right to sue in his own name, gives validity to deeds which prior to its passage were void as against a third person in possession.

SAME.—Real Party in Interest.—Under sections 1073 and 251, R. S. 1881, construed together, one who has conveyed land adversely occupied by another can not maintain an action in his own name to recover possession for the benefit of his grantee, but such action must be brought in the name of such grantee, who is the real party in interest.

From the Blackford Circuit Court.

W. A. Bonham and C. E. Shipley, for appellant.

W. H. Carroll and E. Pierce, for appellee.

COFFEY, J.—This action was commenced in the Blackford Circuit Court to set aside a decree entered in an attachment proceeding and to quiet title to the land described in the complaint. The complaint, omitting the formal parts, is substantially as follows:

“James E. Sims, for the use of Peter Drayer, complains of Elias D. Peck and says that the plaintiff is the owner of the following described real estate in Blackford county, Indiana, to wit: The east half of the southeast quarter of section 22, township 23 north, of range 10 east, except twenty

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Peck v. Sims.

acres off of the north end thereof, and also except one acre off of the southeast corner thereof; that defendant claims to be the owner of said land, as follows: That on the 12th day of February, 1877, one Gilbert Wilson procured to be issued a writ of attachment against the property of James M. Sims, a non-resident of the State of Indiana; that the sheriff of said county made return of said writ as follows: 'Come to hand February 12th at 4 o'clock P. M. Served the same by taking with myself Jesse H. Dowell, a creditable householder of the county of Blackford, and did then and there attach the following described real estate, to wit: The fractional east half of the southeast quarter of section 22, township 23, range 10 east, containing (61) sixty-one acres more or less, situate in Blackford county, Indiana, which real estate is appraised at twenty dollars per acre.

(Signed)

" 'JESSE H. DOWELL.

" 'CHARLES A. RHINE, Sheriff.'

" That afterwards, at the May term, 1877, such proceedings were had that the court rendered judgment in favor of said Gilbert Wilson and one Alexander Sims, who had become a party under said attachment proceeding, for the amount of their claims, and made an order for the sale of said real estate as described in said levy; that said judgment was made without other notice to the said Sims than a newspaper publication, which publication was made upon an affidavit as follows, to wit:

" Gilbert Wilson v. James M. Sims. *Attachment.*

" Blackford Circuit Court, March Term, 1877.

" On this 7th day of March, 1877, comes into open court John Brownlee, of lawful age and a disinterested person, who on oath states that James M. Sims, one of the defendants in the above cause, is not a resident of the State of Indiana; that said cause is an attachment which has been levied on real estate, and further saith not. J. BROWNLEE.

" Subscribed and sworn to, this March 7, 1877.

" JAMES B. WEIR, Clerk."

Peck v. Sims.

That said James M. Sims had no other notice of said action ; that the clerk of said court afterwards issued a special execution to the sheriff of said county, describing the real estate as in the order of the court and in the levy aforesaid, and afterwards the sheriff sold, or made a pretended sale, of the same to one Samuel Peck, without giving any newspaper notice of said sale, and at the expiration of one year executed to said Samuel Peck a deed describing no land except as in said levy, order of sale, and execution ; that there is no such real estate as thus described ; that afterwards said Peck made a pretended purchase of said land, at private sale, for delinquent taxes, and within two years the auditor of said county executed to said Samuel Peck a tax deed, describing said real estate as a fraction of east half of said southwest quarter ; that the defendant is in possession, and claims to be the owner of the land described first herein by conveyance from Samuel D. Peck under said conveyance above set forth ; that at the time of said attachment the said James M. Sims was the owner of the land first above described, who, however, with his wife, at the rendition of said judgment, has since conveyed the same to the said Peter Drayer ; the plaintiff asks an accounting, and offers to pay to defendant whatever may be due him on account of taxes, or any other just claim, and asks that his title be forever quieted and confirmed ; that he recover possession thereof ; that judgment and sheriff's sale be set aside, and for all other general and proper relief."

During the pendency of the action the defendant, Elias D. Peck, died, and the appellant, who is his only heir, was brought into court by a supplemental complaint. The appellant being a minor, the court, upon proof of that fact, appointed William A. Bonham as his guardian *ad litem*. Said guardian filed a demurrer to the above complaint for the reasons: 1st. That said complaint does not state facts sufficient to constitute a cause of action. 2d. That there is a defect of parties plaintiff in this, to wit, that the facts stated in the complaint do not show that James M. Sims has

Peck v. Sims.

any interest in the real estate in controversy, and is neither a proper nor necessary party plaintiff herein.

The court overruled this demurrer and the appellant excepted. The appellant then answered the complaint by a general denial, and also filed a counter-claim in which he set up the several liens upon the land in controversy, paid by the claimants under the sheriff's sale set up in the complaint, and prayed that the amount of such liens might be ascertained, and that the appellant might be subrogated to the rights of the original lien-holders.

The cause was tried by the court, who found for the appellee upon his complaint, ascertained the amount of the liens paid by those claiming title under the attachment proceeding, entered a decree quieting the title of the appellee, and decreed that the appellee should pay to the appellant the liens paid, within a given time, and that in default thereof the land should be sold for the payment of the same. The errors assigned in this court are :

First. That the court below erred in overruling the demurrer to the complaint.

Second. That the court erred in overruling the appellant's motion for a new trial.

Third. That the court had no jurisdiction of the action, or of the defendant.

Fourth. That the special judge trying the cause had no jurisdiction of the cause, or of the defendant.

We know judicially that the east half of the southeast quarter of section twenty-two (22), in township twenty-three (23) north, of range ten (10) east, is not a fractional eighty-acre tract of land. The courts take judicial notice of the geography and topography of the State and of the United States surveys. *Hays v. State*, 8 Ind. 425; *Glenn v. Porter*, 49 Ind. 500; *Bannister v. Grassy Fork, etc., Ass'n*, 52 Ind. 178; *Murphy v. Hendricks*, 57 Ind. 593; *Carr v. McCampbell*, 61 Ind. 97.

The description contained in the return of the sheriff to

Peck v. Sims.

the writ of attachment, as we have seen, is as follows: "The fractional east half of the southeast quarter of section 22, township 23, range 10 east, containing sixty-one (61) acres more or less;" and the question for our consideration is, is this a sufficient description?

It is not the office of a description to identify the land conveyed, but to furnish the means of identification. *Scheible v. Slagle*, 89 Ind. 323; *Burrow v. Terre Haute, etc., R. R. Co.*, 107 Ind. 432. In the case of *Howell v. Zerbee*, 26 Ind. 214, it was held that a description as follows was not a good description: "Situated in the county of Starke, and State of Indiana, a part of lot 3, section 36, in township 33, range 4 west, containing five acres."

In the case of *Porter v. Byrne*, 10 Ind. 146, it was held that a description as "One-half of lot 60, in the town of Evansville" (not showing which half), was bad.

In *Jolly v. Ghering*, 40 Ind. 139, a description as follows: "In Montgomery county, part of the southwest quarter of section —, township nineteen, range four west, containing," etc., was held bad.

In *City of Crawfordsville v. Irwin*, 46 Ind. 438, a description as follows: "On part of lot No. 110 in the original plat of the city of Crawfordsville," was held bad for uncertainty.

In the case of *Buck v. Axt*, 85 Ind. 512, the description in a school fund mortgage, which described the land as "The northeast part," of a specified tract, "containing ninety acres," was insufficient, and that a sale by the auditor under such description conveyed no title.

In the case of *Shoemaker v. McMonigle*, 86 Ind. 421, a description as follows: "The southeast part of the southeast fourth of the northeast quarter of section 36, township four south, and range 2 east, containing thirty-two acres," was held void for uncertainty.

All that can be ascertained from the return of the sheriff to the writ of attachment is, that he levied the writ on a frac-

Peck v. Sims.

tional part of the east half of the southeast quarter of section 22, township 23 north, of range 10 east, containing sixty-one acres.

In what part of the eighty-acre tract this sixty-one acres is to be found is wholly unknown, and there is nothing in the description by which it can be ascertained. In our opinion, this description is too indefinite to furnish a foundation for a valid decree for the sale of the land, and that the sale made by such description is void, and conferred no title upon the purchaser. But notwithstanding the fact that the sale under the attachment proceedings is void, we think the court erred in overruling the demurrer to the complaint. Prior to 1881 a deed executed by a grantor to land in the adverse possession of another, was void as to the person in possession, and the grantee could not maintain an action in his own name for the possession of such land. The grantee could, however, maintain an action in the name of his grantor, and such grantor was not permitted to deny the use of his name for that purpose, because the deed as between him and the grantee was valid, and if the grantee succeeded in recovering the land in the name of his grantor, such recovery inured to his benefit. *Steeple v. Downing*, 60 Ind. 478. But section 1073, R. S. 1881, in force at the time of the commencement of this suit, provides that any person having the right to recover the possession of real estate, or to quiet title thereto in the name of any other person or persons, shall have a right to recover possession or quiet title in his own name; and no action shall be defeated or reversed when it might have been successfully maintained by the plaintiff in the name of another, to enure to his benefit.

This provision is a part of our present code, and is to be construed in connection with section 251, R. S. 1881, which provides that every action must be prosecuted in the name of the real party in interest. It affirmatively appears by the complaint now under consideration that the plaintiff in this case, James M. Sims, had conveyed the land in dispute to

Peck v. Sims.

Peter Drayer prior to the commencement of this suit. James M. Sims, therefore, had no interest in the land at the time he commenced this action. Section 1073 gives validity to deeds which prior to its passage were void as to the party in possession, and the action for the recovery of the lands covered by such deeds must be prosecuted in the name of the grantee. To hold otherwise would be to hold that a party in the adverse possession of lands, when conveyed, might be harassed by two suits. If the grantor may now maintain the action, if he were defeated the grantee could bring a new suit, and as he was not a party to the action brought by his grantor he would not be bound thereby. Furthermore, it does not appear from the complaint now under consideration that the appellee or his grantor was in the adverse possession of the land now in dispute at the time of the conveyance from Sims to Drayer, nor does it appear that this action is being prosecuted either with the knowledge or the consent of Drayer.

As the complaint does not state a cause of action in favor of the appellee, it follows that the court erred in overruling the demurrer thereto.

The judgment is reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed October 16, 1889.

No. 14,485.

SPHUNG ET AL. v. MOORE.

REAL ESTATE.—Action to Recover.—Complaint.—Conclusions of Law.—Variance.—Where a complaint to recover real estate alleges that the plaintiff is the owner in fee, and that fact is stated in the special finding, and a proper judgment is rendered, the fact that the conclusions of law characterize the plaintiff's title merely as "good and sufficient," is not material.

SAME.—Swamp Land.—Meander Line.—Riparian Owner.—Where one, by a chain of conveyances running back to the United States, acquires title to "that part of the northeast fractional quarter of section 36, township 23 north, range 4 west, lying south of the Kankakee river," being swamp land, the meander line of the river does not constitute the boundary of his land, but he is a riparian owner, and may maintain an action of ejectment against one who, without his consent, has taken possession of the land lying between such meander line and the river.

From the Starke Circuit Court.

H. R. Robbins, for appellants.

S. J. Peelle, G. W. Beeman and W. L. Taylor, for appellee.

OLDS, J.—This is an action in ejectment brought by the appellee against the appellants. The court found the facts specially, and stated its conclusions of law, and rendered judgment for the appellee.

The first error assigned and discussed is the overruling of the demurrer to each paragraph of the complaint. The complaint is in two paragraphs. The first paragraph alleges that the plaintiff is the owner in fee and is entitled to the possession of the fractional northeast quarter of section 36, in township 33 north, of range 4 west, lying south of the Kankakee river, in Starke county, Indiana, and that said defendants now hold and have possession of said land unlawfully and without right, and for one year last past have unlawfully kept plaintiff out of possession.

The second paragraph alleges that the plaintiff is the

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Sphung et al. v. Moore.

owner in fee and entitled to the possession of all that part of the fractional northeast quarter of section 36, in township 33 north, of range 4 west, which lies south of the middle line of the Kankakee river, in Starke county, Indiana, and that defendants without any legal right whatever wrongfully hold, detain and keep the possession thereof from the plaintiff, and have kept him from the possession for the past year.

The objection made to each of the paragraphs of complaint is, that they are indefinite and do not properly describe the real estate sought to be recovered. This objection is not well taken. Each of the paragraphs properly and definitely describes the real estate in question.

The finding of facts shows that on the 4th day of March, 1850, the United States granted to the Wabash and Erie Canal the north half of the southeast quarter, and that part of the northeast fractional quarter of section 36, township 33, range 4 west, lying south of the Kankakee river, containing 122.70 acres; that on the 14th day of January, 1866, the Wabash and Erie Canal executed a deed for said land to Alvin M. Higgins; that on the 2d day of April, 1872, said Higgins executed a deed for said land to Joseph Glenn, and that on the 1st of April, 1880, the executors of said Glenn, by due authority, executed a deed for the entire interest of said Glenn to the plaintiff, who still holds such interest; that the said lands are the same lands described in the complaint; that said lands lie on the south side of the Kankakee river, or English lake; that when originally surveyed, by the authority of the United States, said river or lake was meandered, and the meander line of said river or lake was across the northeast quarter of said section 36; that the strip of land between the said meander line and the river contained about forty-three acres, which is not a part of the bed of the river, but is dry land, and not subject to overflow, except a small strip along the margin of the stream; that the defendants, without the con-

Sphung *et al.* v. Moore.

sent of the plaintiff, took possession of a small portion of the land in said northeast quarter of said section 36, included within such meandered line and the margin of the river, and held such possession against the will of the plaintiff; that the portion of said land so occupied by the defendants, in time of high water is almost covered with water; that the defendants assert no title whatever to the portion of such land so occupied by them.

Upon the foregoing facts the court stated the following conclusions of law:

1st. That the plaintiff has a good and sufficient title to the lands described in the complaint.

2d. That the lands so described in the complaint include the premises so taken possession of and occupied by the defendants, and accordingly that the defendants are trespassers on the rights of the plaintiff.

The defendants excepted to each of the conclusions of law.

The defendants then filed a motion for a new trial, which was overruled, and exceptions taken, and the defendants then filed a motion for a *venire de novo*, the grounds stated in the motion being "on account of the insufficiency of the special findings of fact and conclusions of law thereon," which motion was overruled, and exceptions taken, and the court rendered judgment in favor of the plaintiff.

It is contended that the conclusions of law do not entitle the plaintiff to a recovery, for the reason that the conclusion of law is that the plaintiff is seized of a good and sufficient title; that if he had an equitable title it would be a good and sufficient title, and yet not entitle the plaintiff to recover on his complaint, which alleges that he is the owner in fee of the real estate. The facts found in this case show the plaintiff to be the owner in fee of the real estate, and a proper judgment was rendered in the cause.

The fact that the court stated an erroneous conclusion of law, or failed properly to state conclusions of law, is not available as error by an exception to the conclusions of law

Sphung *et al.* v. Moore.

as stated, when a proper judgment is rendered on the facts found. *Slauter v. Favorite*, 107 Ind. 291, and authorities there cited.

If a proper result has been reached, the judgment will not be reversed for a harmless error.

There was no error in overruling the motion for a *venire de novo*.

The next question we shall consider is the alleged error in overruling the motion for a new trial.

The land in controversy was originally granted to the Wabash and Erie Canal by the general government. In the selection of the land by the trustees of the canal the tract in question was described as the northeast quarter of section 36, township 33 north, of range 4 west, containing 122.70 acres.

Subsequently the commissioner of the general land office, as *ex officio* surveyor general of Indiana, corrected the description on the official plat in the general land office at Washington and that of the register of the district land office, and on the original plat of the lands with the state authorities at Indianapolis, and certified that such correction had been made, and that the correct description of such land was the north half of the southeast quarter, and that part of the northeast fractional quarter of section 36, in township 33 north, of range 4 west, of the principal meridian of Indiana, which lies south of the Kankakee river, containing in all 122.70 acres, and such certificate of the commissioner of the general land office was annexed to the approved list of lands selected and approved to the company in his office, which certificate was properly certified and recorded in the recorder's office of Starke county, Indiana.

The plaintiff, to make out his case, introduced a deed from the Wabash and Erie Canal to Alvin M. Higgins, and a deed from Alvin M. Higgins to Joseph Glenn, the said deeds each describing the land conveyed as the northeast quarter of sec. 36, town. 33 north, of range 4 west, containing 122.70

Sphung *et al.* v. Moore.

acres; plaintiff also introduced the record of the certificate of the commissioner of the general land office hereinbefore described; also a deed from the executors of the last will and testament of said Joseph Glenn, deceased, to the plaintiff. The land conveyed by said deed from the executors was described in the deed as the north half of the southwest quarter, and that part of the northeast fractional quarter of section 36, township 33 north, of range 4 west, of the principal meridian of Indiana, which lies south of the Kankakee river, containing in all 122.70 acres.

Objection was made by the appellant to the introduction of each of these deeds and the certificate, on the ground that they did not, nor did either of them, describe the land described in the complaint. This objection was properly overruled. The description in the deeds from the Wabash and Erie Canal to Higgins, and from Higgins to Glenn, included all the land in the northeast quarter of said section 36, and included the land in said quarter section lying south of the Kankakee river, described in the complaint, and the evidence introduced constituted a valid chain of title from the United States to the plaintiff, and sustained the finding of the court.

It is contended by counsel for the appellants that as the land occupied by the appellants was situate between the meandered line and the river, it was not included within the grant to the Wabash canal and conveyed by the deeds and mesne conveyances through which plaintiff claims title. In other words, counsel claim that the meandered line constituted the boundary line of the northeast fractional quarter of section 36, and that line being a distance from the bed of the river the plaintiff is not a riparian owner. In this counsel are in error. The meandered line does not constitute the boundary line, but the Kankakee river constituted the boundary, and the plaintiff was a riparian owner. *Ross v. Faust*, 54 Ind. 471; *Ridgway v. Ludlow*, 58 Ind. 248; *Edwards v. Ogle*, 76 Ind. 302. *State v. Portsmouth*

The State v. Brinneman *et al.*

Savings Bank, 106 Ind. 435, holds that a purchaser of swamp lands takes whatever there may be within the subdivision of land purchased by him. See p. 452.

It is not material in this case to decide whether the water's edge or the thread of the river constituted the true boundary line, as the land occupied by the appellants was situated within the subdivision of land purchased and owned by the appellee, and between the water's edge and the meandered line, and was a part of said northeast quarter of said section 36, lying south of the Kankakee river.

There is no error in the case.

Judgment affirmed, with costs.

Filed Oct. 16, 1889.

No. 13,810.

THE STATE v. BRINNEMAN ET AL.

DIVORCE.—*Undefended Petition.*—*Duty of Prosecuting Attorney.*—*Striking Out Pleading.*—Under section 1038, R. S. 1881, it is the duty of a prosecuting attorney, when a petition for divorce remains undefended, to appear and resist the petition; but where, after he has filed an answer, the defendant appears and answers, the court may, without error, strike out the pleading of the prosecutor, as the latter may, if he has reason to believe that the proceeding is collusive, continue his appearance and proceed under the pleadings of the parties.

From the Wells Circuit Court.

E. C. Vaughn, Prosecuting Attorney, for the State.

A. N. Martin and *A. L. Sharpe*, for appellees.

MITCHELL, J.—Sarah A. Brinneman complained of her husband, Solomon Brinneman, and charged that the latter, for more than two years next before the commencement of

The State v. Brinneman *et al.*

this suit, failed to make any reasonable provision for her support, or that of her infant child. She prayed judgment, dissolving her marriage with the defendant.

The prosecuting attorney appeared and answered, denying the material allegations of the complaint. Afterwards the defendant appeared in person and by attorney and answered by a general denial. Thereupon the court, upon the motion of the plaintiff, struck out the answer of the prosecuting attorney, notwithstanding the latter deposed to the effect that he had reason to believe that the appearance and answer of the defendant were merely colorable, and for the purpose of furthering the design of the plaintiff to obtain a divorce without sufficient cause. At the hearing, the court gave judgment in favor of the defendant, upon a cross-bill, in which he charged the plaintiff with having abandoned him.

This appeal is by the State, and the only question involved relates to the propriety of the ruling of the court in striking out the answer of the prosecuting attorney. Recognizing the interest which the State has in maintaining the family relation, and in preventing the dissolution of the marriage tie by collusion, the statute makes it the duty of the prosecuting attorney, whenever any petition for divorce remains undefended, to appear and resist the petition. Section 1038, R. S. 1881; *Scott v. Scott*, 17 Ind. 309; *People v. Dawell*, 25 Mich. 247 (12 Am. Rep. 260).

Public policy requires that the marital relation shall not be severed for inadequate causes; that families shall not be broken up and disrupted from unworthy motives, and that reconciliation shall be effected if practicable or possible. The prosecuting attorney has a public duty to perform, and it is his right to perform that duty without unreasonable embarrassment. *Jordan v. Westerman*, 62 Mich. 170 (28 N. W. Rep. 826).

The proper interpretation of this statute must be that, in the absence of an appearance by the defendant in a proceed-

The State v. Brinneman *et al.*

ing for divorce, it becomes the duty of the prosecuting attorney to enter an appearance for the defendant, and resist the petition, by taking all proper steps to prevent the granting of a divorce, unless the facts make a case entitling the petitioner to a judgment.

Where, however, the defendant appears and answers, it may be presumed that a *bona fide* defence is intended, and unless there is good reason to believe that the appearance and answer are a mere pretext and cover, intended to assist in obtaining a collusive divorce, the prosecuting attorney has no further duty to perform. Even if he should believe that the defendant did not contemplate a *bona fide* defence, so long as the latter had an answer or cross-complaint on file there could be no necessity that the prosecutor should also have a separate answer in order to enable him to resist the petition. The answer of the defendant was sufficient, no matter what his purpose was in filing it.

In the interest of the State, it would doubtless be the duty of the prosecutor, notwithstanding the appearance and answer of the defendant, to appear and resist the petition, and take all proper steps to defeat the obtaining of a divorce by collusion, in case there appeared reasonable ground to believe that the appearance and defence were merely colorable.

The prosecuting attorney was in no way hindered from appearing and resisting the petition in the present case. It does not appear that he offered any evidence which the court refused to hear, or that he was in any way denied the fullest opportunity to resist the granting of a divorce on the petition of the plaintiff, or the cross-petition of the defendant.

There was, therefore, no error in the ruling of the court in striking out the answer of the prosecutor, after the defendant had appeared and answered. We decide nothing as to the right of the State to appeal in a case like this, no such question having been made.

The judgment is affirmed, with costs.

Filed Oct. 17, 1889.

Nixon v. Whitely, Fasler & Kelly Company.

No. 13,856.

NIXON v. WHITELEY, FASLER & KELLY COMPANY.

MARRIED WOMAN.—*Contract of Suretyship.*—Where a married woman, as the agent of an implement company, contracts with the company to become responsible for the payment of all implements and machines sold by her, and in pursuance of the agreement guarantees the payment of a promissory note by written endorsement, such guaranty is a contract of suretyship, and under the provisions of section 5119, R. S. 1881, relating to married women, is void.

From the Fountain Circuit Court.

J. B. Martin, for appellant.

J. B. Schwin and C. E. Booe, for appellee.

COFFEY, J.—On the 13th day of November, 1883, the appellee, by a written contract of that date, appointed the appellant as its agent to sell farming implements in the territory of Fountain county, Indiana, the agency to continue from that date until August 1st, 1884. The contract between the parties stipulated that when implements or machines were sold the appellant should become responsible therefor, and should secure the payment for the same as follows: One-third September 1st, 1884, one-third January 1st, 1885, and one-third September 1st, 1885.

The contract further stipulated that all implements and machines sold should be settled for in cash, or purchasers' notes, endorsed by the appellant and made payable in a bank, drawing interest at the rate of six per cent. from August 1st 1884, until paid.

Pursuant to the terms of this contract and agency the appellant sold a machine to Joseph Maginin, and took from him the following promissory note:

“\$100.

EUGENE, IND., July 15, 1884.

“Fifteen months after date, for value received, I, of Eugene

120 360
126 303120 360
128 22120 360
131 209120 360
139 56120 360
149 19120 360
154 360120 360
159 165120 360
160 528

160 530

Nixon v. Whitely, Fasler & Kelly Company.

P. O., Vermillion county, Indiana, promise to pay to Whitely, Fasler & Kelly, or order, one hundred dollars, negotiable and payable at American Express office, Eugene, Indiana, with interest at eight per cent. per annum from first of October, 1884, and with attorney's fees; value received, without any relief whatever from valuation or appraisement laws. The drawers and endorsers severally waive presentment for payment and notice of protest and non-payment of this note.

JOSEPH MAGININ."

In settlement for machines sold by her the appellant turned over to the appellee the above note, with the following guaranty endorsed thereon:

"For value received I guarantee the payment of the within note when due, and waive demand, notice of non-payment and protest.

MARY F. NIXON."

The complaint in this case is based upon this guaranty, setting out the contract and averring that at the time of the execution of said contract, note and guaranty, the appellant was a married woman, the wife of Marshall Nixon; that she was engaged in carrying on business in her own right, and that said contract, note and guaranty were executed in the transaction of said business.

The appellant demurred to the complaint, alleging as a reason that the same did not state facts sufficient to constitute a cause of action; but her demurrer was overruled by the court, and she excepted.

She filed an answer in four paragraphs, and the court sustaining a demurrer to the second paragraph of her answer, she excepted.

Upon a trial of the cause by the court the appellee had judgment.

The errors assigned here are:

First. That the court erred in overruling the demurrer to the complaint.

Second. That the court below erred in sustaining the de-

Nixon v. Whitely, Fasler & Kelly Company.

murrer of the appellee to the second paragraph of the appellant's answer.

Third. That the court erred in overruling the appellant's motion for a new trial.

The first question presented for our consideration relates to the sufficiency of the complaint as a cause of action, and this question depends upon whether the contracts above set out are such as bind a married woman.

Section 5115, R. S. 1881, provides that all legal disabilities of married women to make contracts are abolished, except as otherwise in that act provided.

Section 5119 provides that a married woman shall not enter into any contract of suretyship, whether as endorser, guarantor or in any other manner, and such contract, as to her, shall be void.

In the case of *Vogel v. Leichner*, 102 Ind. 55, it is said that "Whether a contract executed by a married woman is one of suretyship or not, will be determined by a consideration, of whether or not it was made by her or on her behalf, and upon a consideration moving to her or for the benefit of her separate estate. To the extent that the consideration was received by her, or enured to her benefit, or the benefit of her estate, she will be held to have contracted as principal. To the extent that the consideration was received by her husband, or any other person, or that it went to pay a debt or liability, for which neither she nor her property was bound, it will be held a contract of suretyship. * * * The wife had no power to deal as principal if in fact she was surety. Whether she was principal or surety will be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry, was the wife to receive, either in person or in benefit to her estate, or did she so receive the consideration upon which the contract rests?" See, also, *Ellis v. Baker*, 116 Ind. 408; *Brown v. Will*, 103 Ind. 71; *Cupp v. Campbell*, 103 Ind. 213.

Nixon v. Whitely, Fasler & Kelly Company.

The question upon which this case must ultimately be decided, is the question as to whether the appellant is to be treated as the surety of the maker of the note above set out; because if she is surety, then, as she has no power to enter into a contract of suretyship, the contract as to her is void. It is evident that the consideration for the note did not pass to her. It passed to the maker of the note. She sold the property which constituted the consideration of the note as the mere agent of the appellees, and had no interest therein further than the compensation she was to receive for such sale. The original contract between her and the appellees bound her to endorse the note; and it is fair to presume that the guaranty written on the back of the note was accepted as a compliance with such obligation. The guaranty in this case is not dated, and is, therefore, presumed to have been executed at the same time and upon the same consideration as the note upon which it is endorsed. *Bondurant v. Bladen*, 19 Ind. 160. And the liability of the guarantor is measured by the liability of his principal. *Smith v. Rogers*, 14 Ind. 224. Had the appellant endorsed the note in suit in strict compliance with the terms of the contract between her and the appellees, as the consideration for the note passed to the maker, she would have been nothing more than a surety for such maker. *Nurre v. Chittenden*, 56 Ind. 462; *Core v. Wilson*, 40 Ind. 204; *Houston v. Bruner*, 39 Ind. 376; *Dickerson v. Board, etc.*, 6 Ind. 128.

Legally construed, the contract between the appellant and the appellee was, that she should become the surety to the appellees for the makers of such notes she took for the purchase-price of implements and machines sold by her on a credit. That such a contract was in the teeth of section 5119, *supra*, the appellee was bound to know. It is not to be overlooked that this section expressly prohibits a married woman from becoming either a guarantor or an endorser.

That a married woman is not bound by a contract of the nature of the one now under consideration, see *Allen v. Da-*

Quick v. Brenner.

vis, 99 Ind. 216; *Dodge v. Kinzy*, 101 Ind. 102; *Allen v. Davis*, 101 Ind. 187; *Brown v. Will*, 103 Ind. 71; *Engler v. Acker*, 106 Ind. 223; *Jones v. Ewing*, 107 Ind. 313.

We are of the opinion that the complaint does not state a cause of action, and that the court erred in overruling a demurrer thereto.

Judgment reversed, with instructions to sustain a demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed Oct. 17, 1889.

120	364
121	142

No. 13,001.

QUICK v. BRENNER.

MORTGAGE.—Foreclosure.—Res Adjudicata.—Where a widow seeks to have her one-third interest in the realty of her deceased husband set off to her in severalty, or, failing in that, to be allowed to redeem from a mortgage executed by the husband before his death, the theory of the existence of the mortgage having been adopted, a judgment awarding the partition is not an adjudication of the right of the holders of the mortgage to foreclose.

From the Hamilton Circuit Court.

A. F. Shirts and *G. Shirts*, for appellant.

F. M. Trissal, *T. J. Kane* and *T. P. Davis*, for appellee.

BERKSHIRE, J.—This case is an offshoot from the case of *Brenner v. Quick*, 88 Ind. 546, and *Quick v. Brenner*, 101 Ind. 230.

The present action is to foreclose a mortgage executed by Conrad M. Brenner, the former husband of the appellee

Quick v. Brenner.

Catherine Brenner, and who is his widow, anterior to his marriage with her, to secure several promissory notes executed by the said Conrad M. Brenner to one Christian Baston. The said notes and mortgage were executed on the 9th day of September, 1854, and the last of said notes to fall due matured March 20th, 1857. This action was brought on the 2d day of May, 1885.

Several answers and replies were filed, and the case having been put at issue was tried by the court, and a finding made for the appellees.

The appellants moved the court for a new trial, which the court overruled, and they excepted. Judgment was then rendered for the appellees.

The appellants assign several errors and the appellees one cross-error.

The cross-error is not well assigned. The sufficiency of one of several paragraphs in a complaint can not be questioned for the first time by the assignment of error in this court; but, as the conclusion we have reached must result in a new trial of the case, we do not feel that it is improper for us to say that we regard each paragraph of the complaint as stating a cause of action.

Of the several errors assigned by the appellants their counsel only refer to three of them in their brief; this is a waiver as to the others. These are, error of the court in overruling the demurrer to the fourth paragraph of answer; error committed by the court in overruling the appellant's demurrer to the seventh paragraph of answer; and error committed by the court in overruling the motion for a new trial.

Our conclusion as to the two first named of these errors renders it unnecessary that we should consider the one last named. The two may properly be considered together. The fourth and seventh paragraphs of answer are in the nature of pleas of estoppel by record.

We do not care to spend much time in giving our reasons for the conclusion to which we have arrived, which is that

Quick v. Brenner.

both the fourth and seventh paragraphs of answer are bad, and the demurrers thereto should have been sustained. These paragraphs are quite lengthy, and especially the fourth paragraph. Among other things it contains copies of the pleadings and judgment in the former action.

The facts stated show very clearly the right of subrogation in the appellants, and that their right to foreclose the mortgage was not adjudicated or determined in the former action; it could not have been in the very nature of things. The appellee Catherine Brenner brought the action to settle her title to the one undivided third of the real estate which she claimed by inheritance from her deceased husband, and demanded partition, and that her one-third be set off to her in severalty, and in case she was not entitled to such relief, then she asked for an accounting, and that she be allowed to redeem from the mortgage sued on in this action.

The court sustained her claim to one-third of the real estate independent of any right to an accounting and redemption, and she recovered judgment for one-third of the real estate, and her one-third was set off to her in severalty. Her theory, from the commencement of the action to the final judgment, was that there had never been a foreclosure of the mortgage, and that she was the legal owner of an undivided one-third of the real estate, and entitled to partition, and this theory of the case was adopted by the court, and she obtained judgment accordingly.

The law will not permit parties first to blow hot and then to blow cold. The widow having adopted the theory stated above, and followed it through to final judgment, will not thereafter be permitted to assume that the action was prosecuted upon some other theory, and as she will not be permitted so to do, neither will her privy in estate.

Judgment reversed, with costs, and with instructions to the court below to grant a new trial and to sustain the demurrers to the fourth and seventh paragraphs of answer.

Filed Oct. 17, 1889.

The Louisville, New Albany and Chicago Railway Company v. Green.

No. 13,183.

**THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. GREEN.**

NEW TRIAL.—*Causes for.*—*Verdict.*—*Practice.*—Alleged error in refusing to send the jury back to further consider their verdict and in discharging them over objection, will not be considered on appeal, unless assigned as cause for a new trial in the motion therefor.

SPECIAL VERDICT.—*Venire de Novo.*—If a special verdict, stripped of improper matter, is sufficient to support a judgment under the issues made by the pleadings, a motion for a *venire de novo* should be overruled.

SAME.—*Material Defects.*—*Remedy.*—If a special verdict fails to find facts established by the evidence, or finds facts not established thereby, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*.

SAME.—*Motion for Judgment on.*—*Separate Causes of Action.*—Where the plaintiff seeks a recovery upon distinct causes of action, set up in separate paragraphs, in case a special verdict is returned, a motion by the defendant for judgment in his favor as to one cause of action should be sustained, if the facts found entitle him to judgment.

RAILROAD.—*Highway Crossing.*—*Failure to Give Signals.*—*Liability for Animals Killed.*—The failure of the engineer to give the crossing signals required by statute (section 4020, R. S. 1881), will not entitle a party to recover for a cow killed by a passing train upon a highway crossing, although she escaped from a sufficient enclosure, without the fault of the plaintiff, who made diligent efforts to find her, unless the facts authorize the conclusion that the failure to give the signals caused the death of the animal. Such a conclusion is not justified on account of a failure to sound the whistle, if the other statutory signals are given.

SAME.—*Presumption that Signals were Given.*—*Special Verdict.*—If a special verdict is silent upon a material point, such point will be deemed as found against the party having the burden; so, where the verdict, while finding that the whistle was sounded, is silent with reference to the ringing of the bell, it will be deemed that the latter signal was given, the presumption being, in the absence of a showing to the contrary, that the engineer did his duty.

From the Hamilton Circuit Court.

S. O. Bayless, G. W. Easley and W. H. Russell, for appellant.

R. R. Stephenson, W. R. Fertig and C. W. Griffin, for appellee.

120	367
131	115
180	367
186	191
120	367
149	190
150	630

The Louisville, New Albany and Chicago Railway Company v. Green.

OLDS, J.—This action was commenced before a justice of the peace and an appeal taken to the circuit court, where an amended complaint in three paragraphs was filed.

The first paragraph alleges the killing of one cow and the injuring of another by the defendant, on August 20th, 1885, with its locomotive and cars, at a place where the defendant's track was not fenced, but where it might have been fenced.

The second paragraph alleges that on the night of the 20th of August, 1885, two cows, owned by the plaintiff, without his knowledge or fault, broke out of the enclosure in which he had them confined, and wandered upon the defendant's railroad track at a point where said railroad crossed a public highway in said county, and while so on, or in the immediate vicinity of, said crossing, the defendant's agents in charge of one of its locomotives and trains, wilfully, carelessly, purposely, and unlawfully, run its said locomotive and train upon and against said cows, thereby killing one and maiming and crippling the other, to the plaintiff's damage, etc.

The third paragraph avers, that on the night of the 20th of August, 1885, two cows belonging to the plaintiff, without his knowledge or fault, broke out of the inclosure in which he had them safely confined, and wandered upon the defendant's railroad track, at a point where said railroad crosses a public highway in said county of Hamilton, and while on, or in the vicinity of, said crossing, the defendant's agents in charge of its cars and locomotive ran upon and against said cows, thereby killing one and maiming and crippling the other, without any fault on the part of the plaintiff, and to his damage in the sum of \$100. The plaintiff further avers that said defendant, by its employees, was running its train of cars at a fast rate of speed at the time said cattle were injured and killed, and at the crossing where they were so injured, and while said defendant by its employees was approaching said crossing with its locomotive and train of

The Louisville, New Albany and Chicago Railway Company v. Green.

cars, it did, by its employees, carelessly and negligently, and wilfully, neglect to sound the whistle attached to said locomotive before it reached said crossing, or to ring the bell, or make any effort to alarm said cattle, or frighten them from the track before they were killed and injured in the manner aforesaid; that by reason of the premises said cattle were killed and injured by the defendant, without the fault of the plaintiff, and to his damage in the sum of \$100.

There was a trial by jury, and, at the plaintiff's request, the jury returned a special verdict as follows:

"We, the jury, find the following special verdict in said cause: That the defendant is the owner of, and operates, a line of railroad through the plaintiff's farm, in Hamilton county, Indiana, as averred in the complaint; and on the night of August 20th, 1885, one of the plaintiff's cows, being in one of his pasture-fields on said farm, passed into another field of his, through which the defendant's railroad passed, and wandered upon the said track at a point in the plaintiff's cornfield where said road was not fenced, and where there were no side-tracks, nor highways, nor streets, nor anything else to prevent the defendant from fencing its said road, and when upon said railroad track at said point in said open cornfield where it was not fenced, one of the defendant's passing locomotives and trains ran upon and against said cow, and so maimed and crippled her as to render her entirely worthless. Before she was so injured, she was reasonably worth fifty-five (55) dollars.

"We further find that on the same night another of the plaintiff's cows, without his fault, broke through his pasture fence, in which he had her safely confined, and the night being so dark, the plaintiff, after diligent searching, was unable to find her that night, and during the night she went upon defendant's track at a point where the same crosses a public highway, and while upon said crossing the defendant's train passed, and without sounding any whistle before reaching

The Louisville, New Albany and Chicago Railway Company v. Green.

said crossing, or making any attempt to frighten said cow from said crossing, passed by at a high rate of speed, and in so doing purposely, and by reason of not sounding any alarm, ran over said cow with its locomotive, in said county, and killed her. Had the whistle been sounded before reaching said crossing, or the speed of the train slackened, said cow would not, in our judgment, have been killed, but the killing was caused by the defendant's servants in charge of its train, wilfully and purposely, negligently failing and refusing to give any signals on approaching said crossing. The cow so killed was of the value of sixty dollars. If, upon the foregoing facts, the law be with the plaintiff, then we find for the plaintiff, and assess his damages at \$115; but if the law be with the defendant, then we find for the defendant. If the law be for the plaintiff in relation to the cow injured in the cornfield, and for the defendant as to the cow killed at the crossing, then we find for the plaintiff, and assess his damages at fifty-five (55) dollars.

"JOHN F. WHITE, *Foreman*."

Upon the return of the jury with their special verdict, and before the discharge of the jury, the defendant objected to the verdict, and moved the court to send the jury back to consider further of their verdict, for the reasons:

First. That the verdict did not find facts sufficient to base a judgment upon.

Second. That the verdict did not find all the material facts in issue.

Third. That the verdict did not find facts in issue, but found conclusions of law.

Fourth. That the facts found in the verdict were evidential, and not ultimate facts.

Fifth. That the verdict found defendant to have been negligent only as conclusions of law, and did not find the facts from which the court could determine the question of negligence.

Sixth. That the verdict finds the plaintiff to have been

The Louisville, New Albany and Chicago Railway Company v. Green.

free from contributory negligence as a conclusion of law without finding the facts in regard thereto.

The court overruled this motion, to which defendant excepted, and, over defendant's objection and exception, discharged the jury, which action and ruling of the court is duly presented by a bill of exceptions.

The defendant filed a motion to strike out certain specific parts of the special verdict, which was overruled, and the question on the ruling is saved by bill of exceptions.

After the motion to strike out parts of the verdict, the defendant filed its motion for a *venire de novo*. After the overruling of the motion for a *venire de novo*, defendant filed his motion for a new trial, which was overruled, and exceptions reserved. The defendant then filed a motion for judgment in its favor on the special verdict found by the jury. This motion being overruled, the defendant then moved for judgment in its favor upon the special verdict as to the injury, loss, and damage to the plaintiff by reason of the killing of that one of the plaintiff's cows found to have been struck upon a public road crossing, and moves the court to find and render judgment for the defendant in so far as the value of said cow is concerned, which motion was overruled, and exceptions taken, and, on the motion of the plaintiff, the court rendered judgment in favor of the plaintiff on the special verdict for \$115 and costs.

The assignments of errors are :

1st. The overruling of the demurrer to the third paragraph of amended complaint.

2d. That neither the second nor third paragraphs of the amended complaint states facts sufficient to constitute a cause of action.

3d. That the court erred in overruling appellant's motion to require the jury to consider further of the special verdict, and erred in discharging the jury over appellant's objection.

4th. That the court erred in overruling appellant's motion for a *venire de novo*.

The Louisville, New Albany and Chicago Railway Company v. Green.

5th. That the court erred in overruling appellant's motion to strike out the conclusions of law and findings of evidence from the special verdict.

6th. That the court erred in overruling appellant's motion for a new trial.

7th. That the court erred in overruling appellant's motion for judgment in its favor on the special verdict.

8th. That the court erred in overruling appellant's motion for judgment in its favor on the special verdict as to the cow killed on the crossing.

9th. That the court erred in sustaining appellee's motion for judgment on the verdict, and erred in rendering judgment thereon.

No question is discussed as to the insufficiency of either paragraph of complaint, and no objection is pointed out to either paragraph, and, therefore, the two first errors assigned are waived, and we do not consider them.

The third assignment of error presents no question. The refusal of the court to send the jury back to consider further, for the reasons stated in the motion of appellant, and the discharging of the jury over appellant's objection, are matters which must be presented by a motion for a new trial. The object sought by the appellant is to question the rulings of the court in overruling its motion to require the jury to be sent back and consider further of their verdict, and in overruling its objection to the discharge of the jury, and if the rulings were erroneous they constituted error of law occurring at the trial, and to present any question as to such ruling, the ruling must be assigned as error in the motion for a new trial. The trial continues until the rendition of the verdict by the jury. See "Trial," 2 Rapalje and Lawrence Law Dictionary, and 2 Bouvier Law Dictionary.

In passing upon this question, as we have, we do not intend to hold that it is proper practice, in a case wherein a special verdict is requested, for the court, on motion, to send the jury back after they have returned a verdict to consider

The Louisville, New Albany and Chicago Railway Company v. Green.

further or to find further facts not included in the special verdict. In the case of *Indiana, etc., R. W. Co. v. Finnell*, 116 Ind. 414, the court says: "It is well settled in this State, that it is the office of a special verdict to find the facts, and not the evidence or conclusions of law. It is, also, as well settled, that it does not follow that because a special verdict may contain evidence, conclusions of law, facts without the issues, or fails to find facts proven, a motion for a *venire de novo* must be sustained. Matters thus improperly found will be disregarded. But if, stripped of those matters, the verdict is yet sufficient to lead to and support a judgment either way under the issue as made by the pleadings, a motion for a *venire de novo* will be overruled. If such a verdict fails to find facts established by the evidence, or finds facts not established by the evidence, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*." Governed by this rule there was clearly no error in overruling the motion for a *venire de novo*, as the facts found show the appellee entitled to recover a judgment for the value of one cow.

The fifth assignment of error is not discussed, and hence we do not consider it.

We pass the sixth and seventh assignments of error, and next consider the eighth assignment of error, which presents the question as to the sufficiency of the verdict. Before the rendition of the judgment on the verdict in favor of the appellee, the appellant moved the court for judgment in its favor on the special verdict as to the cow killed on the highway crossing, and the court overruled the motion. This was a proper motion. The two causes of action were clearly distinct, and if the facts found in the special verdict entitled the appellee to a judgment in its favor upon the one cause of action, the motion should have been sustained. *Johnson v. Culver*, 116 Ind. 278.

The facts found in the special verdict relating to the cow killed upon the highway crossing we think may be stated as

The Louisville, New Albany and Chicago Railway Company v. Green.

follows: That plaintiff's cow, without his fault, broke through his pasture fence in the night-time; that the fence was a safe one, and plaintiff made diligent search and was unable, by reason of the darkness of the night, to find her, and during the same night she entered upon the defendant's track at a point where the same crosses a public highway, and while the cow was upon the said crossing, defendant's train passed said crossing at a high rate of speed without sounding any whistle before reaching said crossing, and the locomotive ran over said cow and killed her. These constitute the material facts found.

There are some epithets and some conclusions stated in the verdict, but they must be excluded in determining the sufficiency of the verdict. It is also stated that the defendant made no attempt to frighten said cow from said crossing, but there is no finding of facts that the employees running the train saw the cow or knew she was upon the crossing, and if they did not see her or know she was upon the crossing, they were not required to make any attempt to frighten her off the track.

It is very doubtful whether the appellant has a right to recover for this cow in any event, in view of the fact that the cow was at large upon the highway, the plaintiff being required to keep his cattle upon his own land; and the question is presented as to whether or not the cow was not trespassing, even if she escaped without appellant's fault; and if so, whether there can be a recovery even if appellee's negligence caused the injury; but in view of the theory we take of the question presented by the motion, we deem it unnecessary to decide whether this would defeat a recovery or not.

The appellee seeks to recover in this case by reason of the omission of the engineer and persons in charge of the train to comply with the requirements of the statute in sounding the whistle before crossing the highway. Section 4020, R. S. 1881, makes it the duty of engineers running engines upon railroads, upon approaching a highway crossing, to

The Louisville, New Albany and Chicago Railway Company v. Green.

sound the whistle three times at a distance of not more than one hundred and not less than eighty rods from such crossing, and to continuously ring the bell from that time until such engine has passed such crossing.

Thus the engineer is required to sound the whistle distinctly three times between eighty and one hundred rods from the highway crossing, and continuously ring the bell from a distance of eighty rods before reaching the crossing until his engine has passed over the crossing.

Section 4021 makes the engineer liable to the State for failure to comply with the provision of section 4020; it also provides that "the company in whose employ such engineer or person may be, as well as the person himself, shall be liable in damages to any person or his representatives who may be injured in property or person, or to any corporation that may be injured in property, by the neglect or failure of such engineer or other person as aforesaid."

There is no fact found in the verdict to show the employees had any knowledge of the cow being upon the crossing, and the fast rate of speed of itself constituted no negligence; it does not appear that the train was running at any unlawful rate of speed, and the only negligence, if any, with which the employees of the appellee are chargeable is omitting to sound the whistle, and unless from the facts found the conclusion can be drawn that the death of the cow was caused by reason of the fact that the whistle was not sounded, there can be no recovery, for the statute expressly provides that the liability is for property injured by reason of the reason of the failure to sound the whistle and ring the bell.

It is the well settled rule that if the finding or verdict is silent upon a material point, on that point it is against the party having the burden. *Dennis v. Louisville, etc., R. W. Co.*, 116 Ind. 42.

In the absence of a finding of a fact to the contrary, the presumption is that the engineer in charge of the train discharged his duties, and sounded the whistle and rang the bell

The Louisville, New Albany and Chicago Railway Company v. Green.

as the statute required. The jury found as a fact that he did not sound the whistle, but the verdict is silent as to whether or not he rang the bell, and being silent as to that fact, we are to pass upon the question as if that fact was found in the verdict in the affirmative. With this omitted fact supplied, as the law supplies it, the question presented is, whether we can draw the conclusion that the death of the cow killed upon the highway crossing was caused by the neglect of the engineer to sound the whistle. In order to entitle the appellee to judgment for the value of this cow, the inference must be drawn that the cow remained on the track notwithstanding the noise of the approaching train, the ringing of the bell, and the shining head-light of the engine coming at a rapid rate of speed towards her, but if the whistle had been sounded she would have left the track and avoided instant death. We do not think this conclusion can be drawn from the facts found in the special verdict. The primary object of the statute is to add to the safety of human life, and to surround it with an additional safeguard by requiring a signal to be given to persons in the vicinity of highway crossings, warning them of an approaching train, that they may heed the warning and avoid danger. It is manifestly not the primary object or purpose of the statute to require this signal for the purpose of frightening animals which may chance to stray upon the crossing, as the law does not permit cattle to run at large in the highways of the State, and the presumption is that none will be upon the highway; and if they were, would no doubt be as liable to become frightened at the approaching train as by the signals required. While upon the contrary, persons with vehicles and driving animals are rightfully upon the highway, and it is to be presumed if a signal is given they will avoid danger.

The court erred in overruling appellant's motion for judgment in its favor for the cow killed on the highway crossing.

The question is presented on the overruling of the motion for new trial as to the sufficiency of the evidence, but there

Cooper v. The State.

is sufficient evidence to support the verdict as to the one cow described in the first part of the verdict. There are also some questions presented as to the ruling of the court on the admission of evidence. We have examined them, and do not think there is any error in the admission of evidence for which the judgment should be reversed.

It is also contended that the court erred in some of its instructions given to the jury, but the instructions which it is contended are erroneous relate to the liability for the cow killed upon the highway crossing, and taking the view we have as to the liability of the appellant for this cow, it is unnecessary to pass upon the question as to the instructions.

For the error committed in the overruling of appellant's motion for judgment in its favor for the cow killed on the highway crossing, the judgment must be reversed.

Judgment reversed, at costs of appellee, with instructions to the court below to sustain appellant's motion for judgment in its favor for the cow killed upon the highway crossing, and to render judgment in favor of appellee for the damage done to the cow described in the record as injured upon the track where the same was not fenced.

Filed Oct. 17, 1889.

No. 14,586.

COOPER v. THE STATE.

CRIMINAL LAW.—*Grand Jury.*—*Irregularities.*—*Abatement.*—Mere irregularities in drawing and organizing a grand jury composed of qualified persons, which are not prejudicial to the substantial rights of the defendant, and involve no charge of fraud or corruption, are not available as a plea in abatement.

190	377
191	19
192	18
190	377
199	619
190	377
141	151
142	166
143	688
190	377
144	249
120	377
149	406
149	407
151	496
120	377
153	378
120	377
157	539
120	377
169	386
170	652

Cooper v. The State.

SAME.—*Waiver of Right to Plead in Abatement.*—By pleading to the indictment and procuring a change of venue, the defendant waives his right to file a plea in abatement, and to object to the qualification of grand jurors or to the mode of drawing or constituting that body.

SAME.—*Instructions to Jury.—Reversal of Judgment.*—If, upon considering all of the instructions together, it appears that the law was stated with substantial accuracy, so that the jury could not have been misled, there is no ground for reversal, although a particular instruction or detached portion may not be precisely accurate.

SAME.—*Bill of Exceptions.—Statement Concerning Instructions.*—Where it does not appear by an affirmative statement in the bill of exceptions that the instructions set out therein are all that were given, the judgment will not be reversed unless the instruction complained of is so radically wrong as to be incurable.

SAME.—*New Trial.—Newly Discovered Evidence.*—To secure a new trial on the ground of newly discovered evidence, either diligence or an excuse for not exercising it must be shown, and it must also appear that the new evidence is of such character as to raise a reasonable presumption that the result would be different on a second trial.

SAME.—*Excessive Use of Intoxicants.—Delirium Tremens.*—After an accused has been convicted of murder over a defence of self-defence, affidavits of newly discovered witnesses to the effect that for several months prior to the homicide the accused drank intoxicating liquors to such an extent that he either had, or was on the verge of having, the *delirium tremens* when the homicide occurred, of which facts the accused, as an excuse for not exercising diligence, deposes that he was ignorant until the affidavits were read to him after the trial, are not sufficient to authorize a new trial.

SAME.—*Unsoundness of Mind.—Conclusion of Witness.*—Statements of witnesses, in affidavits in support of an application for a new trial on the ground of new evidence, that by the excessive drinking of intoxicating liquors the accused's mental faculties had become so impaired that he was not responsible for his acts, are mere conclusions, which will be disregarded.

SAME.—*Separation of Jury.—Misconduct.*—A separation by one or two jurors for a necessary purpose, attended by the proper officer, is not misconduct which entitles a party to a new trial.

From the Jefferson Circuit Court.

F. M. Griffith, J. W. Linck and J. A. Works, for appellant.

L. T. Michener, Attorney General, M. R. Sulzer, Prosecuting Attorney, and J. H. Gillett, for the State.

Cooper v. The State.

MITCHELL, J.—An indictment was returned into the Switzerland Circuit Court charging the appellant, Cooper, with the crime of murder. After arraignment, and plea of not guilty, the defendant applied for, and procured, the venue of the cause to be changed to Jefferson county. After appearing in the circuit court of the latter county he withdrew his plea of not guilty and pleaded in abatement, assigning as reasons for abating the indictment: 1. That the grand jury was not drawn within a period not more than one week preceding the commencement of the term at which the indictment was found and returned. 2. That two of the persons drawn as grand jurors were drawn by the names of C. H. Bascom and J. C. Ricketts respectively, their christian names being otherwise omitted. 3. That only three of the persons drawn and summoned as grand jurors appeared in court; that the places of the three who failed to appear were filled by the sheriff from the bystanders, and that the record does not show that the persons thus called were examined touching their qualifications. 4. That the court appointed one of the persons thus called from the bystanders as foreman of the grand jury.

The court sustained a demurrer to the plea. In this there was no error.

The intervention of mere irregularities in drawing and organizing the grand jury, which involve no charge of fraud or corruption, and which in no way prejudice the substantial rights of the defendant, assuming, in the absence of anything appearing to the contrary, that the body as constituted was composed of persons duly examined and qualified, and not subject to any of the statutory causes of challenge, is not available as a plea to abate the indictment. Whart. Cr. Pl. and Pr. (9th ed.), section 350; *State v. Mellor*, 13 R. I. 666.

Section 1656, R. S. 1881, specifies certain causes for which a grand jury may be challenged, and confines the right of challenge to the causes specified. It may be that in case a

Cooper v. The State.

person accused of crime has no opportunity to make the challenge, the facts upon which a challenge might have been predicated could be pleaded in abatement at the proper time, but the grounds available as a basis for challenge can not be extended by plea in abatement. Besides, the right to file a plea in abatement was waived by pleading to the indictment, and applying for and obtaining a change of venue, which was equivalent to a general continuance.

An objection to the qualification of grand jurors, or to the mode of drawing or constituting the body, must be made before pleading to the indictment. If not made until after plea, the objection is waived. *United States v. Gale*, 109 U. S. 65; *Cooper v. State*, 64 Md. 40.

"Though the demand upon the prisoner at the arraignment is to say whether he is guilty or not guilty, he may, instead of answering this question, * * * plead in abatement. * * And he must plead in abatement or demur now, or not at all; for his right to do either is waived by the plea of guilty or not guilty." 1 Bishop Cr. Proc., section 730.

"Without leave of court, which is granted only in very strong cases, the plea of not guilty can not be withdrawn to let in a plea in abatement, for on principle a plea of not guilty admits all that a plea in abatement contests, and after a plea of not guilty, a plea in abatement is too late. A plea in abatement, also, can not, it has been held, be filed after a general continuance." Whart. Cr. Pl. and Pr., section 426.

The plea was, as we have seen, intrinsically insufficient, and not having been filed until after the defendant pleaded not guilty, which plea does not appear to have been withdrawn by special leave of court, there was ample justification on either ground for the ruling of the court in sustaining the demurrer.

It is objected that the court erred in defining the crime of manslaughter, in that it omitted the word "voluntary." In all other respects the definition follows the statute literally. It is not perceived how the defendant could have been prej-

Cooper v. The State.

udiced by the omission of this word. Besides, the omitted word was in effect supplied in an instruction subsequently given.

The rule is firmly established that if, upon considering all the instructions together, it fairly appears that the law was stated with substantial accuracy, so that the jury could not have been misled, no ground for reversal is presented, even though a particular instruction, or some detached portion thereof, may not be precisely accurate.

Other instructions given by the court are made the subjects of criticism. What has been said above is applicable to all those to which objection is made. Without setting out the instructions, or indulging in extended comment upon them, it is enough to say that certain expressions may be found in each of those pointed out as objectionable, relating to abstract principles of law, which when considered apart from the instructions as a whole, may not be strictly and technically accurate, but with the exception that they seem unnecessarily long and numerous, they are not justly subject to animadversion.

It may not be amiss to remark that, as a rule, whenever instructions extend beyond a clear and concise statement of the law applicable to the facts as admitted or claimed to be proven in the particular case, they become hindrances rather than aids to a jury of non-professional men, unacquainted with the abstract principles and technical language of the law. Thompson Trials, section 2333.

Moreover, while it appears that the court gave certain instructions, set out in a bill of exceptions, it does not affirmatively appear, either by implication or by a direct statement to that effect, that the instructions set out in the bill were all that were given. In the absence of such affirmative statement, or something from which the fact could be implied, we could not reverse a judgment unless an instruction complained of was so radically wrong as to be incurable.

Cooper v. The State.

Puett v. Beard, 86 Ind. 104 ; *Garrett v. State*, 109 Ind. 527 ; *Grubb v. State*, 117 Ind. 277.

The appellant predicated his defence wholly upon the theory that he had taken the life of a human being in what he believed to be the lawful and justifiable defence of his person. He went upon the stand as a witness in his own behalf, and gave an intelligent and detailed account of all the circumstances and inducements, as he claimed, that led up to and culminated in the homicide. After a verdict finding him guilty of murder in the second degree, the defendant assigned, as one of the grounds for a new trial, that since the return of the verdict he had discovered new, competent and material evidence, which is embodied in the affidavits of six or seven witnesses, whom it is alleged can be produced if a new trial should be granted. These persons all depose, in substance, that for several months prior to the homicide the accused indulged the habit of drinking intoxicating liquors to such an extent as that he either had, or was upon the verge of having, the *delirium tremens* about the time the homicide occurred, and that in their opinion he had, by continual drinking to excess, so impaired his mental faculties as that he was of unsound mind, and not responsible for his acts. As an excuse for not exercising diligence in not discovering the above evidence prior to the trial, the accused deposes that he was not aware of the fact that his mind had become affected by drink until he heard the affidavits of the newly discovered witnesses read, and that he never had any knowledge or intimation of the facts set forth in the affidavits before going into the trial. Counsel for the accused deposed substantially to the same effect.

It does not appear how it came about that the new evidence was discovered after the return of the verdict. The showing was insufficient for two reasons: 1. There is no diligence whatever shown, nor do the facts averred present any excuse for the failure to exercise diligence. 2. The evidence alleged to have been newly discovered is not of such

Cooper v. The State.

a character as to raise a reasonable presumption that the result of a second trial would be different from the first.

It is incredible that the accused, after having lived a life of comparative sobriety, should have indulged in a course of continued dissipation for several months until he had reached the verge of *delirium tremens*, and that after recovering therefrom and regaining his faculties, he should have been so utterly oblivious to his previous condition as not to know anything about it, or its effects upon him, until the affidavits of others were read in his hearing. It should be stated that the homicide occurred in November, 1884, after which the accused fled the State, and was not apprehended and tried until after a period of more than three years had elapsed. It can not escape observation, that he and his friends should have remained in total ignorance of his impaired mental condition during all this time, and until after an unsuccessful defence had been made on another theory, stoutly contended for, and that in some undisclosed manner the evidence upon which a defence of insanity was then proposed, should be discovered so soon after an adverse verdict.

The newly discovered testimony amounts to nothing more than that the accused had indulged to excess in drink for several months prior to the homicide, and that he was on the verge of *delirium tremens*. The statements made by the several witnesses that his mental faculties had thereby become impaired to such a degree that he was not responsible for his acts, were mere conclusions which can not be regarded. *Warner v. State*, 114 Ind. 137; *Grubb v. State*, *supra*.

It is not pretended that the homicide occurred while the accused was in a fit of delirium, and the mere fact that he had, by several months' excessive drinking, brought on a nervous condition bordering on delirium, would be very slight evidence of insanity. As is said in *Insurance Co. v. Foley*, 105 U. S. 350: "An attack of *delirium tremens* may sometimes follow a single excessive indulgence."

New trials for newly discovered evidence ought only to

Glatt v. Fortman *et al.*

be granted after the most careful scrutiny of the evidence alleged to have been discovered, and when it raises a violent presumption that a different result would be reached upon a second trial. Thompson Trials, section 2759; *Hines v. Driver*, 100 Ind. 315.

It is shown that two or three of the jurors, accompanied by a sworn bailiff, went from the room in which the jury were deliberating to the water-closet. The affidavit of the bailiff shows that they were not absent to exceed three or four minutes; that they were in his charge all the time, and that no communication was made to them, and that they were guilty of no misconduct.

A separation by one or more jurors for a necessary purpose, attended by the proper officer, is not such misconduct as entitles a party to a new trial. *Riley v. State*, 95 Ind. 446.

The foregoing are all the points that are presented in such a manner as to require notice. There was no error.

The judgment is affirmed, with costs.

Filed Oct. 18, 1889.

180 384
127 314

No. 13,957.

GLATT v. FORTMAN ET AL.

PROMISSORY NOTE.—*Payable in Bank.—Bank not the Agent of Payee.—Insolvency of Bank.*—Where the makers of a note made payable at a designated bank, on the date of its becoming due, pay to the bank both the principal and interest of the note, with the direction that it be applied to its payment, and the bank afterwards becomes insolvent, they are not discharged; for the designation of a bank as the place of payment does not authorize a deposit at the payee's risk, when, as under section 368, R. S. 1881, the payee is not bound to present the note for payment at the designated place to charge the maker, and the bank is not deemed the agent of the payee.

From the Jennings Circuit Court.

Glatt v. Fortman *et al.*

A. G. Smith, for appellant.

J. Overmyer and *F. E. Little*, for appellees.

ELLIOTT, C. J.—The appellant's complaint is founded on a promissory note executed by the appellees. The note contains a provision making it payable at the Jennings County Bank. The answer alleges that on the day the note became due the appellees paid to the bank the principal and interest of the note, and directed that it be applied to its payment; that, at the time the money was placed in the bank the appellees did not know who the holders of the note were, and that long after the money was deposited the bank became insolvent.

The answer must be adjudged bad. We have a statute which reads thus: "In any action or defence, founded upon a bill or note, or other contract for the payment of money at a particular place, it shall not be necessary to prove or aver a demand at the place, but the opposite party may show a readiness to pay such demand at the proper place." Section 368, R. S. 1881.

The effect of this statute is to overthrow the rule sanctioned in *Palmer v. Hughes*, 1 Blackf. 328, and with the fall of that rule fell the right of the maker of a promissory note, payable at a particular bank, to discharge the obligation by depositing the money in the bank for the benefit of the payee. As the law provides that the holder is not bound to present the note to the bank for payment in order to charge the maker, it necessarily follows that money deposited in the bank can not be deemed to be deposited with the payee's agent. It is not placed there at his risk, but at the risk of the payor. The readiness to pay at the place designated constitutes a defence, if properly followed up, but the deposit of the money for the payee does not discharge the maker of the note. The obligation remains in force until payment is made to the payee or his agent, and unless the note is in the

Glatt v. Fortman et al.

hands of the bank it is not the payee's agent. *Wallace v. McConnell*, 13 Peters, 131; *Ward v. Smith*, 7 Wall. 447; *Brabston v. Gibson*, 9 How. 263; *Adams v. Hackensack Improvement Commission*, 44 N. J. Law, 638; *Williamsport, etc., Co. v. Pinkerton*, 95 Pa. St. 62.

The law is a factor in every contract, and it enters into the contract before us, and relieves the payee of the note from the duty of presenting it at the place of payment. As the law provides that the note need not be presented to the bank, the payor had no right to act upon the presumption that the bank was the payee's agent, nor to presume that the payment to the bank discharged him from liability. The rule upon which the payor is bound to act is, that the bank is not authorized to receive payment unless the note is lodged with it, for the designation of the place of payment does not bind the payee to present the note at that place, and, as he is under no obligation to do this, something must be added in order to authorize such a payment to be made to the bank as will extinguish the debt. This is well settled by the adjudged cases.

We attach no importance to the clause in the note waiving presentment for payment, for we think the case governed by the general rule, that the designation of a bank as the place of payment does not authorize a deposit at the payee's risk where there is no obligation resting upon him to present the note at the place designated. The waiver clause is inserted, it may not be amiss to say, for the purpose of holding the endorsers, without a presentment for payment, and it does not affect the rights of the makers of a promissory note. It is the law that dispenses with the necessity of presenting the note at the place fixed, and of this law the contracting parties were bound to take notice.

Judgment reversed.

BERKSHIRE, J., did not take any part in the decision of this case.

Filed Oct. 19, 1889.

Liggett et al. v. Hinkley.

No. 13,741.

LIGGETT ET AL. v. HINKLEY.

NEW TRIAL.—As of Right.—Action to Set Aside Conveyance of Real Estate.

—Judgment Lien.—Where a creditor seeks to set aside a conveyance of real estate in order to subject it to a prior judgment lien, asserting that his debtor is the real owner, the title to the land having been fraudulently taken in the name of another, the debtor is not as of right entitled to a new trial, the title to the land being involved only collaterally.

From the Fulton Circuit Court.

S. Keith, J. D. McLaren and E. C. Martindale, for appellants.

A. C. Capron and M. R. Smith, for appellee.

MITCHELL, J.—This was an action by Mary Hinkley against Jane Liggett and James W. Liggett to set aside a conveyance of certain real estate, and to subject the land to the lien of a judgment theretofore recovered by the plaintiff against the defendant Jane Liggett.

It is averred in the complaint that Jane Liggett paid the purchase-price of the land out of her own means, and that she caused the conveyance to be taken in the name of her son, James W., who paid no part of the consideration, and that this was done with the fraudulent intent, participated in by both the vendor and vendee, to cheat, hinder, and delay the creditors of Jane Liggett, and particularly to put the property beyond the reach of the plaintiff's judgment.

There was a judgment for the plaintiff upon an issue made by the general denial, and a decree subjecting the land to the plaintiff's judgment.

The only question involved in this appeal is the propriety of the ruling of the court in refusing the defendants a new trial as a matter of right, they having made due application therefor in the manner prescribed by the statute.

130	387
123	77
123	199
120	387
140	471

130	387
149	118
151	435
120	387
153	435

The State v. Dittmar.

The plaintiff asserted no claim of title or right to the possession of the land. The action was by a creditor, who asserted that his debtor was the real owner, and that the title to the land had been fraudulently taken in the name of another, who held it in trust for the creditors of one of the defendants. In such an action the losing party is not entitled to a new trial as a matter of right, because the title only comes in question collaterally and as a mere incident. *Perry v. Ensley*, 10 Ind. 378; *Shular v. Shular*, 56 Ind. 30, and cases cited.

It is only where the plaintiff claims a subsisting interest in land, and a right to the possession, or a right to have the title quieted as against another claiming an adverse title, that the statute regulating new trials as a matter of right applies. *Benner v. Benner*, 10 Ind. 256; *Gullett v. Miller*, 106 Ind. 75; *Kreitline v. Franz*, 106 Ind. 359.

Where the purpose of the action is merely to enforce or cancel a lien, encumbrance, or contract, the statute does not apply. *Williams v. Thames, etc., Co.*, 105 Ind. 420; *Voss v. Eller*, 109 Ind. 260.

The judgment is affirmed, with costs.

Filed Oct. 19, 1889.

No. 15,084.

THE STATE v. DITTMAR.

CRIMINAL LAW.—Oppressive Garnishment.—Exemption Laws.—Sending Claim Out of State to Evade.—One who himself takes a claim out of this State with intent to deprive a debtor of the benefit of the exemption laws by instituting proceedings in garnishment in another State, "sends" the claim out of the State, within the meaning of section 2162, R. S. 1881, making such act an offence.

From the Dubois Circuit Court.

The State v. Dittmar.

L. T. Michener, Attorney General, *J. L. Bretz*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

C. L. Jewett, for appellee.

OLDS, J.—This is a prosecution under section 2162, R. S. 1881. The prosecution was commenced before a justice of the peace. There was an appeal to the circuit court, and on leave of court the defendant withdrew his plea of not guilty and moved to quash the affidavit, which motion was sustained, to which ruling of the court the State excepts and appeals and assigns such ruling as error.

The affidavit charges that the defendant Dittmar on the 13th day of February, 1889, at said county of Dubois and State of Indiana, being then and there the owner of a certain demand on contract against him, the said Isaac A. Lockwood, amounting to the sum of \$16.55, with intent, thereby to deprive the said Isaac A. Lockwood of his rights under the statutes of Indiana, on the subject of the exemption of property on proceedings in garnishment, did then and there unlawfully take upon his person said claim into the State of Kentucky for the purpose of collecting the same by proceedings in garnishment against the said Isaac A. Lockwood and against the Louisville, Evansville and St. Louis Railroad Company as garnishee defendant, etc.

The objection made to the affidavit is, that the allegation that the defendant "did unlawfully take upon his person said claim into the State of Kentucky" does not charge a crime under section 2162 of the statute, which declares that whoever sends or causes to be sent out of the State of Indiana any claim for debt to be collected by proceedings in attachment, garnishment, etc., shall upon conviction thereof be fined, etc. This presents the same question as was presented and decided in the case of *State v. Dittmar*, ante, p. 54. Upon the authority of that case we hold that the affidavit is sufficient, and the court erred in sustaining the motion to quash.

 Beem v. Chestnut.

Judgment reversed, at the costs of the appellee, with instructions to overrule the motion to quash.

Filed Oct. 19, 1889.

No. 13,904.

BEEM v. CHESTNUT.

120	390
156	476

INTOXICATING LIQUORS.—Unlawful Sale.—Civil Liability.—Under section 5323, R. S. 1881, one who sells intoxicating liquors to another in violation of the liquor law, is liable personally, as well as upon his bond, to any one who has thereby sustained damage to person, property or means of support.

SAME.—Sale to Intoxicated Person.—Damages to Wife by Being Driven from Home.—One who sells liquors to an intoxicated person, knowing his condition, is liable under section 5323, R. S. 1881, for damages sustained by the wife of the vendee by being driven from home into the cold by her husband, while crazed by the effect of the liquors so sold, whereby she is made sick and suffers pain, loss of time, and expense in being cured.

SAME.—Character of Action.—Contributory Negligence.—Complaint.—The action in such case is not predicated upon the negligence of the defendant, but upon an aggressive wrong, and the plaintiff is not required to aver that she was free from fault contributing to the injury sustained.

From the Lawrence Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellant.

MITCHELL, J.—This was an action by Fannie Chestnut against Richard E. Beem to recover damages alleged to have been sustained to her person, property and means of support, on account of the use by her husband, Haningan Chestnut, of intoxicating liquors unlawfully sold to him by the defendant.

It is averred that the defendant unlawfully sold intoxicat-

Beem v. Chestnut.

ing liquors to the plaintiff's husband, while he was in a state of intoxication, knowing his condition at the time, whereby the latter became crazed and incapacitated for business, and spent and squandered his own and plaintiff's money, thereby causing the plaintiff to sustain damage to her property and means of support.

In an additional paragraph it is further averred that the plaintiff's husband, by reason of the intoxication so unlawfully produced, became crazed, and while in that condition drove her from her home, while thinly clad, into the cold, whereby she was made sick, and was damaged thus by suffering pain and loss of time, and in expenses incurred in being restored to health.

The only question presented involves the propriety of the ruling of the court in overruling the demurrer to the complaint.

The action was against the defendant personally under section 5323, R. S. 1881. That this section authorizes an action in general terms against one who sells intoxicating liquors in violation of the provisions of the liquor law, personally as well as upon his bond, has been definitely settled by recent decisions of this court. *Dunlap v. Wagner*, 85 Ind. 529; *Mulcahey v. Givens*, 115 Ind. 286; *State, ex rel., v. Cooper*, 114 Ind. 12.

It is said, however, that because the main element of damages was predicated upon the cruel treatment which the plaintiff suffered at the hands of her husband, and the impairment of health resulting therefrom, it became necessary to aver that she was free from fault contributing thereto, and that such averment being absent from the complaint made it bad. This view is not sustained.

This was not an action based upon the mere negligence or non-feasance of the defendant, in failing to do that which the law required of him, or made it his duty to do, but upon an actual aggressive wrong, constituting the violation of a positive law, in knowingly selling intoxicating liquors to the

Beem v. Chestnut.

plaintiff's husband while he was in a state of intoxication. *Pennsylvania Co. v. Sinclair*, 62 Ind. 301.

Where one merely neglects a duty which the law imposes upon him, his act may be one of mere neglect or non-feasance, but where, in violation of a positive statute, he does an act to the injury of a third person, he thereby invades the rights of the other, and his act is one of actual aggressive wrong. The rule applicable in cases of assault, or assault and battery, govern in such cases.

The statute regulating the sale of intoxicating liquors stands as a guaranty that no one shall knowingly sell, barter, or give away intoxicating liquors in violation of its provisions, so as to inflict damage upon the person or property or means of support of another. Every citizen of the State has a right to the security which the observance of this law affords, and a violation of the law resulting in injury is an unlawful invasion of the rights of the person injured.

"When the wrong-doing of the defendant is merely negligence, the contributory negligence of the plaintiff may, as is well understood, operate as a defence," but when the defendant does that which amounts to an unlawful invasion of the plaintiff's right of personal security or of private property, the doctrine of contributory negligence has no application. *Chicago, etc., R. R. Co. v. Bills*, 118 Ind. 221; *Town of Salem v. Goller*, 76 Ind. 291; *Steinmetz v. Kelly*, 72 Ind. 442; *Beach Contrib. Neg.*, section 22.

If the expulsion of the plaintiff from her home into the cold was a direct consequence of the defendant's unlawful act, he was civilly liable for the resulting damages to the same extent as if he had expelled her with his own hands. One who in violation of law sets in motion a dangerous, uncontrolled force, must take notice of the consequences that are liable to follow, and be ready to answer under the statute for any damages to the person or property of those who are within its protection. *Dunlap v. Wagner*, *supra*, and cases cited.

Boyd v. Brown *et al.*

In the language of the court in *Schroder v. Crawford*, 94 Ill. 357, "The statute was designed for a practical end, to give a substantial remedy, and should be allowed to have effect according to its natural and obvious meaning."

There was no error in the ruling of the court.

Judgment affirmed, with costs.

Filed Oct. 18, 1889.

No. 13,335.

BOYD v. BROWN ET AL.

VERDICT.—*When Court May Direct for Defendant.*—Where there is no evidence to support a verdict in favor of the plaintiff, the court may properly direct the jury to return a verdict for the defendant.

ATTACHMENT AND GARNISHMENT.—*Attorney's Fees.*—Money paid by a debtor to his attorneys for services to be rendered by them in defending an action against him, is not subject to garnishment in a proceeding ancillary to the main action.

SAME.—*Money Paid under Contract.*—Money paid by a debtor to another in pursuance of a contract whereby the latter undertakes to build a house upon land belonging to the debtor's wife, becomes the property of the contractor, and is not subject to garnishment at the suit of the debtor's creditors.

From the Hancock Circuit Court.

J. A. New, J. W. Jones, I. P. Poulson and W. F. McBane,
for appellant.

C. G. Offutt, E. Marsh and W. W. Cook, for appellees.

COFFEY, J.—This suit was instituted by the appellant against the appellee, Adam T. Brown, in the Hancock Circuit Court, on a promissory note. As ancillary to the main

Boyd v. Brown et al.

action an attachment was sued out and the other appellees were garnished.

The affidavit in attachment charges that the defendant, Adam T. Brown, is about to sell, convey, and otherwise dispose of his property subject to execution, with the fraudulent intent to cheat, hinder, and delay his creditors.

The affidavit in garnishment charges that the appellee Smith has property in his possession, or under his control, belonging to the appellee Brown, which the sheriff can not attach, placed there by the said Brown to cheat and defraud his creditors.

The affidavit in garnishment against the other defendants charges that they have money or other property in their hands belonging to the defendant Brown, placed there after the writ of attachment was served on the appellee Brown.

The cause being at issue was submitted to a jury for trial, and at the conclusion of the evidence for the appellant the court instructed the jury to return a verdict for the defendants as to the attachment proceedings, and the appellant excepted.

Several errors are assigned, but as counsel, in their brief, urge but one, viz., the overruling of the motion for a new trial, we need not set out or consider the others. It is urged by the appellant that the court erred in instructing the jury that there was not sufficient evidence in the cause to support the proceeding in attachment, and that, therefore, they should return a verdict for the defendants as to that branch of the cause.

It appears from the evidence in the cause that for some years prior to the commencement of this suit, and at that time, the appellee Brown was largely indebted to the appellant. A few days prior to the commencement of this suit, the appellee Brown was granted a pension by the United States government in the sum of \$1.051.07, on account of disabilities contracted as a soldier in the army. He delivered the check for this amount of pension money to the appellee

Boyd v. Brown et al.

Smith, who deposited the same to his own credit with the Greenfield Banking Company. Prior to the time that Brown received the check for his pension he had entered into a contract with the appellee Smith, by the terms of which the said Smith agreed to furnish the material and construct a house on the land of Brown's wife for the sum of \$600. It was agreed between them at the time the check was delivered to Smith that he was to retain \$600 of the proceeds thereof as pay for building said house, and was to pay to Brown the remainder. At the time the writ of garnishment was served on Smith he had drawn from the bank the \$600 due to him and had expended it, and was engaged in the building of the house pursuant to the contract with Brown, and had already expended about \$300 for the work and material used in its construction up to that date. He had also paid to Brown the remainder of the proceeds of said check. The money sought to be reached in the hands of the other garnishee defendants is money paid them by Brown as attorney fees in this action. Until Brown received his pension money he was regarded as insolvent, and there is no evidence that the writ of attachment was levied upon any property belonging to him.

There is evidence in the record tending to prove that it was the intention and desire of the appellee Brown to keep his pension money from his creditors. Upon these facts the court instructed the jury to return a verdict for the defendants as to the attachment proceeding, and in this we think the court did not err.

Where there is no evidence to support a verdict in favor of the plaintiff, it is not error for the court to direct the jury to return a verdict for the defendant. *McClaren v. Indianapolis, etc., R. R. Co.*, 83 Ind. 319; *Dodge v. Gaylord*, 53 Ind. 365; *Steinmetz v. Wingate*, 42 Ind. 574; *Koerner v. State*, 98 Ind. 7.

As there could be no order entered in the case for the sale of property, as none had been attached, the only question

Boyd v. Brown et al.

left, so far as the attachment proceeding was concerned, related to the charge that the garnishee defendants had money or property in their hands belonging to the defendant Brown. We know of no rule by which Brown's attorneys could be required to part with the fees they had received for defending this case. They owed him their services as attorneys, it is true, but they owed him no money, neither did they have in their possession any money or property which belonged to him. Nor can it be said that Smith was indebted to Brown in any sum of money, or had under his control any money or property which belonged to him.

When Brown paid Smith the \$600 in consideration of his agreement to furnish the material and build a house, the money became the property of Smith, and Brown had no right to demand of him the payment of any money, if he complied with his contract to build the house. There was, therefore, nothing in the cause upon which any decree or order in the attachment proceeding could be made, and for this reason it was proper for the court to instruct the jury to return a verdict for the defendants as to the attachment proceedings.

Judgment affirmed.

Filed Oct. 18, 1889.

The Ohio and Mississippi Railway Company v. Judy.

No. 13,921.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v. JUDY.

PRACTICE.—*Motion to Strike Out Parts of Depositions.*—*Cause for New Trial.*—*Supreme Court.*—A ruling on a motion to strike out parts of depositions must be assigned as cause for a new trial in order to present any question on appeal.

DAMAGES.—*Excessive Recovery.*—*Supreme Court.*—The Supreme Court will not reverse a judgment on the ground of excessive damages unless the amount allowed appears at first blush to be outrageous and excessive.

SAME.—*Railroad.*—*Unlawful Expulsion of Passenger.*—*Non-Excessive Damages.*—The amount of five thousand five hundred dollars is not excessive damages for injuries sustained by a passenger by falling over a truck at a railroad depot, after his unlawful expulsion from a train, where the evidence shows that the passenger was an active business man, capable of earning from one hundred and fifty dollars to more than two hundred dollars per month, and that at the time of the trial he was deprived of the use of one arm, with a strong probability that the injury would be permanent.

SAME.—*Jury not Required to Itemize Damages.*—In an action for damages resulting from being unlawfully ejected from a train, the jury can not properly be required to itemize, and assess a separate amount for, each element entering into and making up the gross sum allowed, and in determining whether the damages are excessive only the gross sum will be considered.

From the Sullivan Circuit Court.

W. H. De Wolf, S. N. Chambers and E. H. De Wolf, for appellant.

W. A. Cullop, G. W. Shaw and J. S. Pritchett, for appellee.

OLDS, J.—This is an action by the appellee against the appellant to recover damages.

The complaint charges that the plaintiff was a stock dealer, and on the 1st day of December, 1886, he shipped on the defendant's road a car of stock at Sumner, Illinois, consigned to Cincinnati, Ohio, and received from the agent of the defendant a shipping bill, which entitled him to free transportation over the defendant's road to Cincinnati, to take care

120	397
152	555
120	397
166	389
120	397
170	216

The Ohio and Mississippi Railway Company v. Judy.

of his stock; that at Washington, Indiana, he was forcibly ejected from the train in the night-time, some distance from the depot, and in walking along the platform of the depot he fell upon a truck, and sustained serious injuries, greatly bruising, tearing, and lacerating his legs, arms, and body, whereby his right arm and shoulder are permanently disabled; that he has suffered, and will continue to suffer, greatly both in body and in mind.

The action was commenced in the Knox Circuit Court, and by change of venue sent to the Sullivan Circuit Court, where a trial was had, resulting in a verdict for the plaintiff for five thousand five hundred dollars.

The defendant filed a motion for a new trial, which was overruled, and exceptions taken, and judgment rendered for the plaintiff on the verdict.

The appellant assigns as error the overruling of a motion to strike out questions and answers in depositions. The ruling of the court on the motion to strike out questions and answers in the depositions was not assigned as a cause for a new trial, and the question is not properly before this court for a review of the ruling of the trial court. *Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind. 568; *National Bank and Loan Co. v. Dunn*, 106 Ind. 110; *Hatton v. Jones*, 78 Ind. 466.

There is but one other question discussed by counsel in their brief, and that is as to the amount of damages assessed. It is claimed that the damages are excessive, and that the verdict ought to be set aside and a new trial granted.

This question is properly presented in the motion for a new trial.

The appellate court will not reverse a case on the ground of excessive damages unless they appear at first blush to be outrageous and excessive. *Town of Westerville v. Freeman*, 66 Ind. 255; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138.

There was evidence in this case tending to prove that the

The Ohio and Mississippi Railway Company v. Judy.

appellee was a stock dealer in Sumner, Illinois ; that in addition to being engaged as a stock dealer he was also engaged in farming, livery, and other business, having partners in some of the various kinds of business in which he was engaged ; that he shipped a car-load of stock from Sumner, Illinois, to Cincinnati, Ohio, and received a bill of lading, or contract of shipment, entitling him to ride upon the freight train carrying the car of stock ; that he boarded the train ; the first conductor in charge of the train recognized his right to ride upon the train, and punched the contract in the usual way of punching tickets, and carried him to Vincennes, Indiana. At that point another conductor took charge of the train, and refused to recognize the right of the appellee to ride by virtue of the contract, and ordered him off the train, ordering him to get off the train or pay his fare, and refused to carry him further than Washington, Indiana, unless he paid his fare. The appellee did not have a sufficient amount of money with him to pay his fare to Cincinnati, and at Washington the train stopped with the car in which appellee was riding seventy-five or one hundred rods from the depot, and in pursuance to the orders of the conductor the appellee got off the car, and it was very dark, and in going to the depot ran against a truck on the platform, and injured himself ; that the appellee was before that time crippled in the left arm, and that he fell when he ran against the truck and injured his right shoulder and right arm. This occurred in December, 1886, and he was unable to use his arm or do any manual labor up to the time of the trial, in April, 1887, and that he could not put his hand in his pocket or pull his coat off, and had not done so since the injury by reason of such injury to his said arm and shoulder, nor could he drive about to attend to his business or write letters ; that his knee was bruised and was bleeding when he got to a light at the depot, but he suffered no lasting injury from the knee, it soon healed ; that he suffered severely from the injury to his right arm and shoulder for a considerable length of time.

The Ohio and Mississippi Railway Company v. Judy.

The evidence of the witnesses, some of whom are physicians, tends pretty clearly to show that the injury is a permanent one. The appellee is about fifty-one years of age, and there was evidence to show that his services were valuable and worth from one hundred and fifty to upwards of two hundred dollars per month.

We can not say that the damages assessed appear at first blush to be outrageous or excessive. The trial occurred some four months after the injury, and the appellee could not then use his arm.

It is very clear from the evidence that the appellee will suffer from the injury and be deprived of the use of his arm for a considerable length of time at least, and a very strong probability that the injury is a permanent one, which will deprive him of the proper use of his arm during his whole life, and cause him some suffering.

There is some evidence showing that the appellee used intoxicating liquors, but not to excess; also, that he was not confined to his house constantly but a few days, and that he had his arm and shoulder bandaged, and walked about, being more comfortable by doing so than while remaining in the house.

It is evident that the jury were of the opinion that the use of intoxicants and the moving about did not aggravate the injury or retard it from healing.

Interrogatories were submitted for the jury to answer, and it is urged that they answered that they did not know whether the injury was a permanent one or not. This is a fact the jury might have been required to answer definitely, and as they did not we can not give any consideration to the answer, but are compelled to look to the evidence, as we have, in determining the extent of the injury and its permanency.

Interrogatories were also submitted requiring the jury to itemize the damages allowed, stating how much they allowed for humiliation and mortification, how much for mental suffering, how much for physical suffering, and so on, with the

The Ohio and Mississippi Railway Company v. Judy.

different items for which damages are assessable, and answers were made to these interrogatories.

This was not proper practice. Damages were assessable for all the injuries sustained, and the jury can not be required to itemize and assess a separate amount for each element entering into and making up the gross sum allowed. As well it might be required of the plaintiff in his complaint to set forth the particulars of his claim for damages, alleging what amount of damage he sustained by reason of mental suffering, and what on account of physical suffering. This certainly could not be required in a pleading, neither can it be required of a jury to assess the damage for each separately in a case of tort. A rule may be applicable in actions on contracts and not in actions for tort. In an action on an account a bill of particulars may be required, but not in an action for damages for an assault and battery. We can not, therefore, consider the separate items stated by the jury in their answers to interrogatories, but must determine whether the gross sum assessed in the general verdict is excessive.

The judgment should not be reversed by reason of the damages assessed being excessive.

Judgment affirmed, with costs.

Filed Oct. 18, 1889.

VOL. 120.—26

Riggs et al. v. Trees.

No. 13,950.

RIGGS ET AL. v. TREES.

PROMISSORY NOTE.—*Escrow.—Delivery before Condition Performed.—Liability.*—One in whose hands a note has been placed by the maker to be delivered to the payee upon the performance of certain conditions by him, and who, in violation of his obligation, delivers the note to the payee before the performance of the conditions, is liable in damages to the maker, who has become responsible to the payee's endorsee, a *bona fide* holder.

From the Sullivan Circuit Court.

J. S. Bays, J. T. Beasley and A. B. Williams, for appellants.

J. C. Briggs, W. S. Maple and J. T. Hays, for appellee.

ELLIOTT, C. J.—The appellants were partners doing business as real estate brokers. Swain employed them to sell his farm, and they did sell it to the appellee for four thousand dollars. As part of the purchase-price the appellee assumed and agreed to pay the principal, but not the interest, of a mortgage executed to an insurance company to secure eighteen hundred dollars; a like amount was paid in cash, and a note for the remainder was executed by the appellee, and to secure its payment he executed a mortgage upon the land bought of Swain. The note was payable in bank and was placed in the hands of the appellants. By the terms of the contract between the parties the note was to be held by the appellants until an abstract of title was furnished to the appellee, and all liens against the land paid and discharged. The note was not placed in the hands of the appellants for the purpose of passing the title to it, but for the purpose of delivering it to Swain and closing the sale as soon as he had complied with his agreement and paid the liens on the land. The appellants, notwithstanding their agreement to retain possession of the note and mortgage, delivered them without the consent of the appellee to Swain.

Riggs *et al.* v. Trees.

The note was transferred by endorsement to a person for a valuable consideration, before maturity, and the endorsee received it without notice of any defence. At the time the contract of sale was made, there were liens on the land to the amount of \$108 above the amount of the encumbrance assumed by the appellee. Swain is insolvent and is not a resident of the State.

The appellee could not have successfully defended against the note in the hands of the endorsee, for it was by his act that the appellants were enabled to put the note in circulation, and he must suffer rather than the innocent third person. The principle which rules here is the same as that which prevailed in *Quick v. Milligan*, 108 Ind. 419 (55 Am. Rep. 49). One who places in another's hands his promissory note, perfect in all its parts, can not defeat the note in the hands of a *bona fide* holder. The rule, indeed, in cases of promissory notes negotiable under the law merchant extends much further, but we need do no more than apply the principle we have indicated as the governing one, although a much broader rule might be applied.

The appellants violated their contract and must respond in damages. It is no defence for them to assert that in law the delivery to them was absolute, and transferred title to Swain at once, for whatever may be the rule as between payor and payee, it is quite clear that the appellants having agreed to retain the note, were bound to keep their contract.

The assumption that the appellants were the agents of Swain is unfounded, for they undertook to retain the notes under an agreement with the appellee and not as Swain's agents. But if they had received the notes as the agents of Swain, they had no right to violate their agreement with the appellee. If Swain himself had made such an agreement and it was properly evidenced by writing, he would have no right to violate it.

Judgment affirmed, with ten per cent. damages and costs.

Filed Oct. 18, 1889.

Mason v. Burk.

No. 13,891.

MASON v. BURK.

SUPREME COURT.—Law of Case.—Complaint.—The decision of the Supreme Court on a former appeal remains the law of the case through all of its subsequent stages, and a complaint once held good can not thereafter be questioned.

SAME.—Reversal of Judgment.—New Trial as to Whole Case.—Where a judgment is reversed on appeal, with directions to grant a new trial as to the whole case, the granting of a new trial operates upon all the parties to the record.

CONTRACT.—Rescission.—Cancellation of Mortgage.—Where one of the parties to a tripartite transaction, although so directed by the court, refuses to take the steps necessary to secure a performance of the contract, he can not complain of a judgment putting all the parties *in statu quo* by rescinding the contract and cancelling the release of a mortgage held against him and entered satisfied in pursuance of the contract.

From the Montgomery Circuit Court.

L. J. Coppage, for appellant.

T. H. Ristine and *H. H. Ristine*, for appellee.

BERKSHIRE, J.—The record in this case is very imperfect, and in the condition in which we find it we are in some doubt as to whether the questions which counsel for the appellant seeks to present by his assignment of errors are before us. But as we are able to understand the course of the case from the facts stated in the special finding of the court, we will not regard the imperfections in the transcript.

The appellee filed his complaint October 6th, 1884, against George Sims, Jane Sims, and George Mason the appellant. The cause was put at issue and tried by the court, and a special finding of facts and conclusions of law made by the court, a judgment rendered for the appellee against the Simses, and a judgment in favor of the appellant for his costs. From the judgment the Simses appealed to this

120	404
130	17
190	404
134	639
120	404
142	599
130	404
145	313

Mason v. Burk.

court, giving to the appellant, their co-defendant, notice of the appeal as required by the statute.

The appellant filed a paper in this court which he styled a disclaimer. The appellee filed cross-errors. The judgment of the lower court was reversed, and the cause remanded with directions to grant a new trial, and for further proceedings not inconsistent with the opinion of this court. See *Sims v. Burk*, 109 Ind. 214.

After the case again reached the Montgomery Circuit Court, a new trial was granted in obedience to the order of this court, and the appellant was ordered to file a cross-complaint against the Simses. But afterwards, on his motion, the order requiring the appellant to file a cross-complaint was rescinded. After the court had granted a new trial, the appellant filed a demurrer to the complaint, which the court overruled and he excepted. He then filed a motion to strike his name from the record as a defendant to the action, which the court overruled, and he took an exception; he then filed an answer in four paragraphs, the first being a general denial. To the second, third, and fourth paragraphs the appellee filed demurrers, which were overruled as to the second and third paragraphs, and sustained as to the fourth, and exceptions were reserved by the parties respectively.

The appellee then filed a reply in two paragraphs to the second and third paragraphs of the appellant's answer, the first paragraph being a general denial. The appellant filed his demurrer to the second paragraph of reply, which was by the court overruled, and he excepted.

The cause being at issue was, by agreement, submitted to the court for trial, and afterwards, the court (having been requested so to do by the appellant) made a special finding, and to the conclusions of law as stated the appellant excepted, and thereupon a judgment was rendered for the appellee. The appellant assigns errors as follows:

1. The court erred in overruling appellant's demurrer to the complaint.

Mason v. Burk.

2. The court erred in overruling appellant's motion to strike his name from the record.

3. The court erred in sustaining the appellee's demurrer to the fourth paragraph of the appellant's answer.

4. The court erred in overruling appellant's demurrer to the second paragraph of reply.

5. The complaint does not state facts sufficient to constitute a cause of action.

6. The court erred in each and all of its conclusions of law upon the facts found.

It will not be necessary for us to consider the errors assigned separately; we will set out the special finding of the court, which states the facts clearly and concisely, and what we shall say with reference to the facts as found, will dispose of all the questions presented:

" ELLIS BURK

vs.

" GEORGE SIMS ET AL. }

"Come again the parties, and the defendant Mason requests the court to find specially the facts and state the conclusions of law thereon, and the court now specially finds the facts as follows:

"1. That, on the 24th day of September, 1884, the plaintiff, Ellis Burk, was the owner of fourteen (14) acres of land situated in Montgomery county, Indiana, being part of the west half of the southeast quarter of the southwest quarter of section thirty (30), in township twenty (20) north, range four (4) west, bounded as follows: Beginning at the center of said southwest quarter and running thence south 56 rods, thence east 40 rods, thence north 56 rods, thence west 40 rods to the beginning.

"2. That, on the said 24th day of September, 1884, George Mason was the owner in fee of six acres of land in said county, being all of that part of the west half of the southeast quarter of the southwest quarter of said section thirty (30), in township and range aforesaid, which lies south of

Mason v. Burk.

and adjacent to the fourteen acre tract owned by said Burk, as set forth in the finding last above ; that upon said six acres there was a mortgage in favor of the plaintiff, and owing by said George Mason, for \$180, for unpaid purchase-money.

" 3. That prior to said 24th day of September, 1884, defendant Geo. Sims entered into a parol contract with said Burk for the purchase of said Ellis Burk of this said fourteen acres of land therein before described, at \$30 per acre, amounting to the sum of \$420, and that prior to said day Sims also entered into a parol contract with said Mason for the purchase of said six acres of land at \$50 per acre, amounting to the sum of \$300, and out of the purchase-money of said six acres, that said Sims agreed with said Mason to pay to Burk the mortgage thereon on his farm, amounting to \$180.

" 4. That, on the 24th day of September, 1884, when the parties met for the purpose of executing deeds of conveyance in pursuance of said contract of purchase, the defendant George Sims requested said George Mason that he convey his said six-acre tract to Ellis Burk, and that said Ellis Burk then convey the said fourteen-acre tract and said six-acre tract to Jane Sims, the wife of said George Sims, in one deed, to which request Mason and Burk severally assented, said Mason only on condition it would not interfere with his trade with Sims, but of this condition Burk had no knowledge.

" 5. That, on said 24th day of September, 1884, said Burk and wife executed to said Jane Sims a warranty deed for said twenty acres of land, and thereupon said Sims paid to said Burk on his purchase of said fourteen-acre tract of land in cash, \$70, by note on J. W. Goben, \$150, and at the same time he executed to him, Burk, his two promissory notes for \$100 each, and secured said two notes by mortgage on the whole of said twenty-acre tract of land. And at the same time, in pursuance of his contract with said Mason for the purchase of said six-acre tract of land, and in part pay-

Mason v. Burk.

ment of the purchase-money therefor, he paid in cash to said Burk for said Mason the further sum of \$180, being the full amount of the mortgage held by said Burk on said six-acre tract, and due him from said Mason, and that said Burk then released said mortgage upon the proper record in the county recorder's office.

"6. That said George Mason and his wife signed and acknowledged a warranty deed to said Burk on said day for said six-acre tract of land, but failed and refused to deliver the same to said Burk, for the reason that said George Sims refused to pay to said Mason the sum of \$120 due him as the balance of the purchase-money of said six acres over and above the said \$180, according to their said contract of purchase.

"6½. That said six-acre tract of land was included in said deed of Burk to Sims under the expectation and belief on the part of the plaintiff Burk that the contract for the purchase and sale of the same which had been made between said Sims and Mason would then and there, on said 24th day of September, be fully consummated by the execution of a deed therefor to the said Burk as a part of the transaction in accordance with the understanding of all the parties as above found.

"7. That, on October 4th, 1884, and before the beginning of this suit, the plaintiff demanded a rescission of said contract and made demand therefor of said George Sims and Jane Sims, at the same time tendered to them \$250 United States currency, commonly called "greenbacks," and also tendered to them the note on J. W. Goben for \$150, and the two notes of \$100 each which had been executed by them September 4th, 1884, together with the mortgage securing the same, being all that the said Burk had received from them, and at the same time demanded a conveyance to himself of said twenty acres of land.

"8. That said plaintiff, Ellis Burk, was, at the beginning of said suit, able, willing, and ready to bring into court said

Mason v. Burk.

money, notes and mortgage so tendered as aforesaid to said George and Jane Sims, to comply with any order of the court in relation thereto, and ever after continued so ready, able, and willing, until the rendition of the judgment in said cause at the March term, 1887, whereby a rescission was adjudged as between plaintiff and Sims and Sims.

"The court finds that the complaint in this case is the same one originally filed on the 6th day of October, 1884; that prior to the appeal heretofore taken in this case defendants Sims and Sims answered separately, and defendant Mason filed a general denial, and upon the issues joined the court made a special finding of facts and stated conclusions of law; that a judgment was rendered in said cause that plaintiff Burk be released from his covenants of warranty in his deed to said Jane Sims, and that defendant Mason recover of plaintiff his costs taxed at \$—; that the plaintiff was not entitled to a rescission of his contract as to the six-acre tract, nor as to the fourteen-acre tract; from which Sims and Sims took said appeal and joined said Mason as a co-party in said appeal; that said Mason filed in the Supreme Court a disclaimer.

"10. That both plaintiff and defendant Sims excepted to the conclusions of law as stated by the court, but that defendant Mason made no objections or exceptions thereto, and no motion was made for a new trial by any of the parties to said case.

"11. That the defendant Sims appealed to the Supreme Court, and assigned errors against plaintiff Burk upon the record thereof as follows:

" ' STATE OF INDIANA, }	<i>In Supreme Court.</i>
MARION COUNTY. }	
" ' GEORGE SIMS, }	<i>Appeal from Montgomery Circuit Court.</i>
JANE SIMS, }	
GEORGE MASON, }	
vs. }	
ELLIS BURK. }	

"Assignment of errors:

"The appellants George Sims and Jane Sims each sev-

Mason v. Burk.

erally for himself and herself says that there is manifest error in the proceedings and judgment of the Montgomery Circuit Court in the above entitled cause, for the reasons following :

“ ‘ 1st. The court erred in overruling the separate motion of each of said appellants to tax the costs in the cause against the appellee, Ellis Burk.

“ ‘ 2d. The court erred in overruling the separate motion of each of said appellants to tax the costs of the issues tried to said appellee, Ellis Burk.

“ ‘ 3d. The court erred in overruling the separate demurrer of each of the appellants, George Sims and Jane Sims, to the (plaintiff's) appellee's complaint.

“ ‘ 4th. The court erred in its conclusions of law upon the special finding of facts. Wherefore the appellants George Sims and Jane Sims each separately pray the court to reverse in all things the said judgment and proceedings, and they ask all other proper relief.’

“ 12. That said appellants Simses notified George Mason, their co-defendant, of said appeal, and requested him to join therein, but he refused to join therein, and filed in the Supreme Court a disclaimer.

“ 13. The plaintiff, Burk, assigned cross-errors on said record against the defendants Sims and Sims as follows:

“ ‘ In the Supreme Court of Indiana, May term, 1885.

“ ‘ GEORGE SIMS, JANE SIMS, GEORGE MASON, Appellants,
vs. ELLIS BURK, Appellee.

“ ‘ Cross-assignment of errors. The appellee, Ellis Burk, by way of cross-assignment of errors, says that the court committed the following errors against him, namely :

“ ‘ 1. The court erred in its conclusions of law upon the special finding of facts.

“ ‘ 2. The court erred in overruling the demurrer to the separate answer of George Sims and Jane Sims. And the appellee prays that the court will consider and decide upon the errors by him assigned.’

Mason v. Burk.

"And no errors were assigned by Mason, or against him, and no steps taken by the appellee to bring him into court."

"14. That, on the 13th day of January, 1887, the judgment was by said Supreme Court reversed upon the whole record, and the error and cross-errors thereon assigned, and the cause remanded to the circuit court for further proceedings thereon.

"15. That, on the — day of March, 1887, judgment was rendered in the cause between the plaintiff and the defendants Sims by agreement, and said cause discontinued as to them; that defendant George Mason did not agree to said judgment, but was present by counsel and made no objection thereto.

"And the court states as conclusions of law on the foregoing facts:

"1. That the plaintiff, Ellis Burk, is entitled to the relief prayed for in his complaint.

"2. That the reversal of the case by the Supreme Court was a reversal as to the defendant Mason. It therefore finds for said plaintiff. P. S. KENNEDY, *Judge Pro Tem.*"

To each of which conclusions of law the defendant George Mason excepted.

The court then rendered the following judgment:

"It is therefore considered, adjudged, and decreed by the court that the mortgage executed on the 10th day of February, 1883, by said defendant George Mason to the defendant (plaintiff), Ellis Burk, and recorded in the office of the recorder of Montgomery county, Indiana, in mortgage record No. 22, page 172, be firm and effectual, and in full force in favor of the plaintiff, and that the satisfaction of said mortgage entered by said Burk upon the margin of said mortgage record on September 24th, 1884, be set aside and cancelled, and the recorder of said county is hereby authorized and empowered and directed to cancel the satisfaction so entered.

"It is further considered by the court that the plaintiff re-

Mason v. Burk.

cover of the defendant, George Mason, his costs herein laid out and expended, taxed at \$—."

The judgment of this court in the case of *Sims v. Burk*, *supra*, reversed the judgment of the court below as to all the parties against whom judgment was rendered, and the direction given to the court below was to grant a new trial as to the whole case, and when the new trial was granted it was not as to the Simses alone, but operated upon all the parties to the record.

The court below committed no error in overruling the demurrer of the appellant to the complaint, for the reason, if for no other, that this court decided on the former appeal that the facts stated in the complaint not only constituted a good cause of action against the Simses, but also against the appellant. The decision of this court on a former appeal remains the law of the case through all of its subsequent stages. *Dodge v. Gaylord*, 53 Ind. 365; *Board, etc., v. Jameson*, 86 Ind. 154; *Gerber v. Friday*, 87 Ind. 366; *Anderson v. Kramer*, 93 Ind. 170; *Jones v. Castor*, 96 Ind. 307; *Hibbits v. Jack*, 97 Ind. 570.

If the appellant had seen proper after the case had been remanded to the Montgomery Circuit Court, to have followed the direction given by this court, and filed his cross-complaint against the Simses to compel them to perform the agreement with him, and brought into court a conveyance for the six-acre tract which, under the arrangement, he was to convey, on a proper application made by him, the court would have stayed proceedings on the part of the appellee until the matters in question between the Simses and the appellant were determined, and upon obtaining a decree against the Simses, such as would have protected the appellee against the covenants of warranty in his deed to Jane Sims, there would have been no occasion for a rescission of the contract, and the appellant would have had a complete defence to the appellee's action.

But the appellant, when directed by the court below to file

Mason v. Burk.

a cross-complaint, refused to do so, and, upon his application, the order requiring him to file his cross-complaint was set aside. After the appellant had refused to take the necessary steps as marked out by this court, whereby each party would have been required to perform his and her part of the contract, the only course left open to the appellee was to prosecute his action for a rescission of the contract.

After the decision of this court on the former appeal, if the Simses saw proper to accept the inevitable, and let a judgment for a rescission of the contract go as against them, the appellant had no reason to complain; it was immaterial to him whether the matters as between the appellee and the Simses were settled by agreement or at the end of another lawsuit.

After the contract had been rescinded as between the appellee and the Simses, nothing remained to be done to put the parties *in statu quo* but the cancellation of the entry of satisfaction upon the margin of the mortgage record where the mortgage which the appellee held upon the appellant's six-acre tract of land was found recorded.

No part of the indebtedness secured by the mortgage had been paid, and the appellant did not so claim; why, then, should not the mortgage be restored in all of its force and vigor, as before the entry of satisfaction? We can imagine no good reason to the contrary, and none has been pointed out. The proposition is one that equity and good conscience will not tolerate for a moment. The defence which the appellant has made, and is still insisting upon, is but an attempt to take from the appellee an indebtedness honestly due him, amounting to \$180 (for there has never been any claim that it was not a just debt), together with the security which he holds for its payment, with no pretence of giving him anything in return. The proposition is monstrous.

The judgment of the court below was eminently proper, and is affirmed, with costs.

Filed Sept. 27, 1889; petition for a rehearing overruled Dec. 12, 1889.

No. 13,769.

TAYLOR ET AL. v. WILLIAMS.

ATTACHMENT AND GARNISHMENT.—*Promissory Note.*—*Bona Fide Endorsee.*

—*Agreement to Repay Garnishee Maker.*—An agreement by an attachment plaintiff that if a garnishee defendant will pay the amount of the judgment rendered against him he will repay the amount, with interest, attorney's fees and costs, in case the note evidencing the garnishee's indebtedness to the attachment defendant is afterwards enforced against him by a *bona fide* endorsee, is valid and enforceable.

SAME.—*Evidence.*—In such case the record of the attachment proceedings, the record of the endorsee's judgment, and the declarations of the attachment plaintiff are admissible in evidence.

EVIDENCE.—*Erroneous Admission.*—*Harmless Error.*—The erroneous admission of evidence is only available for reversal when prejudicial to the rights of the appellant.

From the Greene Circuit Court.

J. S. Bays, for appellants.

ELLIOTT, C. J.—The material facts pleaded as the cause of action may be thus stated: The appellants instituted proceedings in attachment against Moses Archer, and summoned the appellee as garnishee. Judgment was rendered against the appellee, but the justice of the peace by whom it was rendered had no jurisdiction, and the proceedings were void. The indebtedness of the appellee to Archer was evidenced by a promissory note, which had been assigned to Charlotte Bivens before the proceedings were instituted, but the appellee had no knowledge of this fact. The appellants promised the appellee that if he would pay the judgment they would repay him the amount, with interest, attorney's fees and costs, provided he should be compelled to pay the amount of the note to any other person, and he, relying upon this promise, did pay the judgment. The money paid was received by the appellants. After the payment of the judgment awarded the appellants, Charlotte Bivens, the assignee

Taylor et al. v. Williams.

of the note, obtained judgment against the appellee and he was compelled to pay it.

The complaint is good. The contract of the appellants is founded on a valid consideration, and we can perceive no reason why it should not be enforced. They have money in their hands which in equity belongs to the appellee, and we incline to the opinion that the action would lie even if there had been no express promise, but it is not necessary to decide whether an action would lie if there had been no such promise, for there was a valid contract.

The trial court erred in permitting Mr. Short to testify as to a conversation he had with the appellee, but it is quite clear that the testimony was not of such a nature as to prejudice the appellants. There was not, at all events, such a material error as will justify us in reversing the judgment.

There was no error in admitting in evidence the record of the attachment proceedings, nor was there error in admitting the record of the judgment in the action brought by Charlotte Bivens against the appellee. The trial court did right in permitting the appellee to prove the declarations of the appellants.

Judgment affirmed.

Filed Sept. 23, 1889; petition for a rehearing overruled Dec. 10, 1889.

No. 13,894.

PETERS ET AL. v. BANTA.

PLEADING.—*Supplemental Complaint.*—A supplemental complaint is not an independent pleading, but constitutes a part of the plaintiff's complaint, and as such is not separately demurrable.

SAME.—*Defects Cured by Verdict.*—Where the supplemental complaint and the original pleading together state facts sufficient to bar another action for the same cause, other defects, in the absence of a demurrer, will be cured by verdict.

REAL ESTATE.—*Action to Recover.*—*Pending Appeal.*—In an action to recover possession of real estate the fact that an appeal has been taken from the judgment which constitutes the foundation of the plaintiff's title, is no defence.

VENIRE DE NOVO.—*When Will not be Granted.*—A motion for a *venire de novo* will not lie if there is no such informality or uncertainty in the verdict as to prevent the court from rendering the proper judgment.

SHERIFF'S SALE.—*Issuing of Execution.*—*Finding as to.*—Where it is found that a sheriff advertised property for sale, had it appraised, sold it, executed a certificate of purchase, made a proper return of the order of sale and executed a deed to the purchaser, it will be deemed that an execution was properly issued, without any express finding to that effect.

CHANGE OF VENUE.—*Who Entitled to.*—*Statute Construed.*—The provision of the statute (section 412, R. S. 1881), that a change of venue shall be granted "upon the application of either party," means the plaintiffs or defendants collectively, and does not entitle each individual defendant or plaintiff to a change.

CONTINUANCE.—*Pending Appeal in Other Action.*—It is no ground for a continuance that an appeal has been taken and is pending in another case between the same parties, but, in a proper case and upon a proper application, there may be a stay of proceedings.

PRACTICE.—*Pleading.*—*Harmless Error.*—There is no available error in sustaining a demurrer to a special paragraph of answer if the facts therein pleaded are admissible in evidence under the general denial.

SUPREME COURT.—*Assignment of Error.*—*Must be Specific.*—Under section 655, R. S. 1881, an assignment of error must be specific and definite in its terms; hence an assignment that "the court erred in sustaining the demurrer to the sixth paragraph of the defendant's answer" only calls in question the sufficiency of such paragraph of answer, and the sufficiency of the complaint will not be examined or passed upon.

From the Pulaski Circuit Court.

130	416
131	166
132	597
133	948
130	416
134	333
137	411
120	416
130	356
130	416
131	37
131	115
133	329
130	416
134	625
135	234
120	416
142	661
120	416
144	209
130	416
148	73
148	593
148	594
150	290
120	416
154	149
120	416
162	484
120	416
167	406
120	416
d169	60
d169	61
170	137

Peters et al. v. Banta.

G. E. Ross, for appellants.

D. P. Baldwin, for appellee.

BERKSHIRE, J.—This case originated in the Cass Circuit Court, and the venue changed to the Pulaski Circuit Court. It is an action to recover the possession of real estate, the appellee being the plaintiff in the court below.

Catherine Peters and Margaret Ream filed cross-complaints, and there were several answers and replies filed by the parties.

The appellants Margaret Ream and Catherine Peters assign separate errors, and the said appellants, together with the appellant Abraham Peters, assign joint errors.

The following are the errors assigned by the appellant Ream :

1. The complaint does not state facts sufficient to constitute a good cause of action against her.
2. The court erred in overruling the demurrer of Margaret Ream to the second paragraph of the answer of Henry I. Banta to the cross-complaint of Margaret Ream.
3. The court erred in sustaining the demurrer to the sixth paragraph of the answer of Margaret Ream.
4. The court erred in overruling the demurrer of Margaret Ream to the third paragraph of the plaintiffs' reply.
5. The court erred in overruling the motion of Margaret Ream for a *venire de novo*.
6. The court erred in overruling the motion of Margaret Ream for a new trial.
7. The court erred in overruling the motion of Margaret Ream in arrest of judgment.
8. The court erred in overruling the motion of Margaret Ream for a judgment in her favor on the verdict on the issues formed on the complaint of Henry I. Banta.
9. The court erred in overruling the motion of Margaret

Peters *et al.* v. Banta.

Ream for a judgment in her favor upon the issues formed on her cross-complaint.

10. The court erred in sustaining the motion of the plaintiff for a judgment in his favor on the verdict, and in rendering judgment in favor of the plaintiff.

The errors alleged by this appellant present all the questions that are raised by the errors assigned by the appellants jointly ; therefore we need not set those out in this opinion.

Of the errors assigned by the appellant Catherine Peters, the following present different questions than those raised by the errors assigned by the appellant Ream :

2. The court erred in sustaining the demurrer to the plea in abatement.

3. The court erred in sustaining the demurrer of Henry I. Banta to the cross-complaint of Catherine Peters.

The first and seventh specifications of error of the appellant Ream raise the question as to the sufficiency of the complaint after verdict.

The appellants rely with confidence on the case of *Mansur v. Streight*, 103 Ind. 358. The averments in the complaint in that case are very similar to the averments in the complaint under consideration, as originally filed, and had the complaint under consideration stood unaided by any future pleading when the motion in arrest was made, the authority referred to would rule our decision, and the judgment would have to be reversed. But before the trial the following supplemental complaint was filed :

“ Pulaski Circuit Court, April term, 1887.

“ HENRY I. BANTA *vs.* CATHERINE PETERS, ABRAHAM PETERS *ET AL.*

“ Supplemental complaint, making James McCombes party defendant. For supplemental complaint herein the plaintiff says that he is the owner of lots five and six, D. D. Dykeman's first addition to Logansport, Cass county, Indiana ; that he owns the same in fee simple, and is entitled to the possession of said real estate ; that since the institution

Peters *et al.* v. Banta.

of this suit James McCombes has unlawfully entered into possession of said real estate, and now wrongfully and unlawfully detains possession thereof from this plaintiff, and has so detained possession from this plaintiff for thirty days last past to the plaintiff's damage of ten dollars. Wherefore plaintiff makes him a party to this suit, and asks a judgment against him for the possession of said realty, ten dollars, and costs, and other and proper relief in the premises."

We extract the following from the case of *Farris v. Jones*, 112 Ind. 498 (500): "It is settled by our decisions, that as a supplemental complaint constitutes only a part of the original complaint, after the filing of the former pleading, a demurrer will not lie to such supplemental complaint, and, if filed, it ought to be disregarded."

We copy the following from the case of *Morey v. Ball*, 90 Ind. 450, 455, with reference to the office of a supplemental complaint: "Such supplemental complaint does not supersede the original, but both stand and constitute the complaint. As such pleading only constitutes a part of the complaint a demurrer to it is unknown to our practice, and the court was authorized to disregard it. This is what was done, and in this no error was committed." See *Derry v. Derry*, 98 Ind. 319, where the case of *Morey v. Ball*, *supra*, as to the character and effect of a supplemental complaint, is cited with approval. But we copy further from the opinion of the learned judge in the case of *Farris v. Jones*, *supra*: "The rule of practice which forbids the filing of a demurrer to a supplemental complaint results from the general rule that, under our civil code, a demurrer will not lie to a part of a paragraph of complaint, or other pleading. Section 339, R. S. 1881; *Reno v. Tyson*, 24 Ind. 56. * * The case in hand does not fall within any of the exceptions to the general rule of practice that a demurrer will not lie to a part of a paragraph of complaint. Here, the appellees did not demur until after the appellant had filed his supplemental complaint herein, and it and the original com-

Peters et al. v. Banta.

plaint had become and were only one complaint. To the one complaint, as thus constituted, appellees did not demur, but instead thereof, as we have seen, they filed separate demurrers to the separate parts of such complaint for the alleged insufficiency of the facts therein to constitute a cause of action. The court below ought not, we think, to have entertained or ruled upon these separate demurrers to the separate parts of the one complaint, as then constituted, but ought rather to have rejected, or at least disregarded, such demurrers, as unknown to our practice under the civil code, and to have required appellees to plead further. Certainly, the court erred in entertaining these separate demurrers to the separate parts of the complaint as then constituted, and in holding the cause of action therein stated bad by piecemeal, by an unwarranted procedure unknown to our practice." See *Musselman v. Manly*, 42 Ind. 462; *Davis v. Krug*, 95 Ind. 1; *Simmons v. Lindley*, 108 Ind. 297.

Where the sufficiency of a cause of action is called in question by motion in arrest of judgment, or by error assigned in this court, if facts sufficient are alleged to bar another suit for the same cause of action, all other defects are cured by the verdict and the complaint will be regarded as sufficient to uphold the judgment. *Colchen v. Ninde*, ante, p. 88; *Chapell v. Shuee*, 117 Ind. 481; *Sims v. Dame*, 113 Ind. 127; *Balliett v. Humphreys*, 78 Ind. 388; *Donellan v. Hardy*, 57 Ind. 393.

After the supplemental complaint was filed, the complaint as a whole was clearly sufficient to withstand a motion in arrest of judgment, or an attack made upon it by the assignment of error in this court. We are not called upon to determine whether it would be sufficient as against a demurrer had one been filed.

It is contended, in argument by counsel for the appellants, that the court should have carried the demurrer of the appellee to the sixth paragraph of the appellant Ream's answer back, and sustained it to the complaint, and that, in

effect, the demurrer to the answer was a demurrer to the complaint. Conceding, as a matter of argument, that the position of counsel is correct, he should have assigned an error in this court, thus presenting the question; no such error has been assigned.

We are of the opinion that the second paragraph of the answer of the appellees to the cross-complaint of the appellant Ream contains the substantial allegations required in an answer of former adjudication, although we are compelled to say that it is not very artistically drawn.

The sixth paragraph of the answer of the appellant Ream is clearly bad, and the court did right in sustaining the demurrer thereto. The fact that there had been an appeal from the judgment which was the foundation of the appellee's title, to the Supreme Court, constituted no defence to the action, and as to any other facts pleaded in the answer, if material, they could have been proven under the general denial which the said appellant had filed.

It is our opinion that the third paragraph of reply filed by the appellee to the second, third, fourth, and fifth paragraphs of the answer of the appellant Ream was good as a reply of former adjudication to the matters pleaded in said answers, conceding them to be good, of which we are in some doubt.

The court did not err in overruling the motion for a *venire de novo*.

There was no such informality or uncertainty in the verdict as to prevent the court from rendering the proper judgment upon it. It seems to be in proper form, and the only question is as to which party, under the law, was entitled to judgment on the facts found.

If the facts found were not sufficient under the issues to entitle the appellee to a judgment, then the appellants should have had judgment. *Henderson v. Dickey*, 76 Ind. 264; *Jones v. Baird*, 76 Ind. 164; *City of Lafayette v. Allen*, 81 Ind. 166; *Wilson v. Hamilton*, 75 Ind. 71; *Johnson v. Put-*

Peters et al. v. Banta.

nam, '95 Ind. 57; *Glantz v. City of South Bend*, 106 Ind. 305; *Spraker v. Armstrong*, 79 Ind. 577; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582.

It is true that copies of the sheriff's deed and of the complaint between the parties in a former action were returned with the verdict, and, being mere matters of evidence, added nothing to it, but at the same time the return of these papers did not vitiate the verdict.

The only doubt which we have entertained as to the appellee's right to recover upon the facts as found, has been that there is no finding in direct language, contained in the verdict, that an order of sale, properly issued, was in the hands of the sheriff when he made the sale; but it does appear that he advertised the property, had it appraised, sold it, executed a certificate of purchase, afterwards executed a deed, and that before doing so he returned the order of sale, with his return endorsed thereon, together with the proper receipts for the proceeds of the sale.

We are inclined to the conclusion from these facts that it is sufficiently shown that an execution had properly issued, and was in the hands of the officer when he made the sale.

The evidence is not in the record, and we have failed to discover any reason why the motion for a new trial should have been granted.

Section 412, R. S. 1881, reads as follows, so far as important to the present consideration: "The court in term, or the judge thereof in vacation, shall change the venue of any civil action upon the application of either party, made upon affidavit showing one or more of the following causes: * * *Third*. That the opposite party has an undue influence over the citizens of the county."

It is manifest that the word "party," as used in this statute, is a collective term, and applies to all the parties on either side, whether many or few. If the Legislature had intended that each of the plaintiffs or defendants, whether many or few, should have the right to the benefit of this

Peters *et al.* v. Banta.

statute, different language would have been employed. Besides, such a statute would be impracticable, and in many instances a denial of justice. If there were one hundred or more litigants, the venue would finally have to be changed to another State. See *Krutz v. Howard*, 70 Ind. 174; *Hutts v. Hutts*, 62 Ind. 240.

It was no ground for a continuance of the cause that there had been an appeal taken in another case between the parties, to this court, which was still pending. Had a proper application been made for a stay of proceedings, then a different question would be before us. *Walker v. Heller*, 73 Ind. 46; *Fehrle v. Turner*, 77 Ind. 530.

The court did not err in sustaining the demurrer to the answer of the appellants Peterses, which they call a plea in abatement. It was not a plea in abatement, but alleged facts tending to show that the appellee had no title to the real estate in question; and as a plea in abatement the court would have been justified, on motion, in striking it out; and, therefore, as the same end was accomplished by sustaining the demurrer, there was no error. But as a plea in bar there would have been no available error in sustaining the demurrer, the facts alleged being admissible under the general denial.

The cross-complaint of the appellant Catherine Peters is in the nature of a complaint to review a judgment, and is bad for various and obvious reasons, which we need not enumerate.

The appellee was entitled to a judgment on the verdict of the jury.

We find no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

Filed Sept. 20, 1889.

ON PETITION FOR A REHEARING.

BERKSHIRE, J.—Counsel for the appellant has filed a

Peters et al. v. Banta.

most elaborate petition and brief, and urges it with unusual earnestness.

Three reasons are alleged why the prayer of the petition should be granted. We do not care to notice the second and third, and only call attention to the first that we may cite a section of the statute, and some of our own cases bearing upon the question, which we should have referred to in our original opinion, and had we done so would, no doubt, have saved counsel much labor.

Section 655, R. S. 1881, reads: "No pleading shall be required in the Supreme Court upon an appeal; but a specific assignment of all errors relied upon, to be entered on the transcript in matters of law only, which shall be assigned on or before the first day of the term at which the cause stands for trial; and the appellee shall file his answer thereto."

Webster says, in his second definition, which is the one applicable here, that the word "specific" means "tending to specify, or make particular; definite; limited; precise; as a specific statement."

Applying this definition, when the appellants alleged as error that the court below erred in sustaining the demurrer to the sixth paragraph of answer, they thereby confined and limited this court to a consideration of the answer; not as to whether it was sufficient, though bad, for a bad complaint, but whether or not it stated such facts as in law constituted a good defence to the action, supposing the complaint to be good. The sufficiency of the complaint was not brought in question by the alleged error; as to that pleading it was not particular, definite, limited, or precise. As to the complaint, the alleged error made no specific statement; it made no reference to the complaint. An assignment of error must be specific and definite in its terms. *Ruffing v. Tilton*, 12 Ind. 259; *Hamrick v. Danville, etc., G. R. Co.*, 41 Ind. 170.

In *Stockwell v. State, ex rel.*, 101 Ind. 1, one of the assignments of error was that the court below erred in sustaining

Peters et al. v. Banta.

the demurrer to the third paragraph of answer. In that case the learned judge who delivered the opinion said: "This assignment brings in question the sufficiency of that paragraph of answer and requires an examination of it, but it does not require an examination of the complaint, or call in question its sufficiency." He further says: "It is very clear that the complaint can not be examined, or passed upon, under this assignment of error. To make the question which this appellant seeks to make, he should have assigned as error that the court below erred in not carrying the demurrer back, and sustaining it, to the complaint."

In *Hunter v. Fitzmaurice*, 102 Ind. 449, the error assigned was, that the court below erred in sustaining the appellee's demurrer to the answer of the appellant. It was contended that the demurrer should have been sustained to the complaint.

We make the following quotation from the opinion: "Under the assignment which is set out above, it is contended the court erred in not carrying the demurrer back and sustaining it to the complaint. The defect in the complaint insisted on is that suit was brought on the note before it fell due. Upon this question, if it was properly assigned, the ruling in *Trentman v. Fletcher*, 100 Ind. 105, is applicable. *Stockwell v. State, ex rel.*, 101 Ind. 1. We are of opinion, however, that the assignment of error set out presents no question except the rulings on the above answer."

In *Williams v. Stevenson*, 103 Ind. 243, it is said: "The rule is well settled that the questions for decision here are such, and only such, as are presented by the assignment of errors, and that the record must so present the rulings below that this court may determine as to the correctness of them. *Stockwell v. State, ex rel.*, 101 Ind. 1. We must, therefore, confine our examination to the alleged errors assigned, and pass upon the rulings below so far, and only so far, as the

The Board of Commissioners of Wabash County v. Pearson.

record so presents them, that we may intelligently determine whether they are correct or erroneous."

The petition is overruled, with costs.

Filed Dec. 13, 1889.

No. 13,871.

THE BOARD OF COMMISSIONERS OF WABASH COUNTY v.
PEARSON.

NEGLIGENCE.—County.—Public Bridge.—A county is not liable for an injury caused to a traveller by a bridge giving way, unless it appears that the county authorities failed to exercise ordinary care in constructing or maintaining the bridge.

SAME.—Defective Construction of Bridge.—Safely Using.—Pleading.—The fact that a bridge was safely used for thirteen years does not overcome a direct averment that it was negligently constructed of unsafe and unsuitable materials.

SAME.—Statute of Limitations.—As the right of action does not accrue until the injury is received, the statute of limitations does not begin to run until then, although the defendant's negligence runs back many years prior thereto.

SAME.—Proximate Result of Negligence.—Pleading.—Where the facts pleaded show that the plaintiff's injury was the proximate result of the defendant's negligence, this is sufficient without a direct averment to that effect.

SAME.—Negligent Construction of Bridge.—Notice.—Pleading.—Where the complaint alleges that the defendant county negligently constructed the bridge, which caused the plaintiff's injury, of unsafe and unsuitable material, it is not necessary to aver that the defendant had notice of its unsafe condition.

SAME.—Repairs.—Employment of Incompetent Persons.—Where a county knowingly employs incompetent persons to repair a bridge, and has knowledge that their work is so negligently and unskilfully done as to leave the bridge in an unsafe condition, it is liable for resulting injuries.

120	426
131	61
120	426
137	147
138	253
139	388
139	624
120	426
146	193
146	394
120	426
149	683

120	426
160	520
120	426
164	310
164	576

The Board of Commissioners of Wabash County v. Pearson.

EVIDENCE.—*Personal Injury.*—*Statements as to Nature and Location of Pain.*—

Surgeon.—The surgeon who attended an injured person may, in an action for damages, give in evidence the statements made by the plaintiff as to the nature and location of the pain from which he was suffering.

VENIRE DE NOVO.—*When will be Denied.*—Where the verdict is perfect on its face, and so fully finds the facts as to enable the court to pronounce judgment upon it, a motion for a *venire de novo* will be denied, although the verdict may not find upon all the issues. *Bossaker v. Cramer*, 18 Ind. 44, has been overruled.

From the Huntington Circuit Court.

W. G. Sayre, H. C. Shively, J. B. Kenner and J. I. Dille,
for appellant.

J. T. Hutchens, for appellee.

ELLIOTT, C. J.—The appellee's complaint is in three paragraphs and charges the appellant with having negligently failed to keep a public bridge safe for travel.

Our decisions settle the question of the liability of counties for a negligent breach of duty respecting public bridges, but they do not hold by any means that a county is to be regarded as an insurer of the safety of those structures. If ordinary care is exercised in constructing and maintaining the bridges, there can be no liability. *State, ex rel., v. Demaree*, 80 Ind. 519, and cases cited; *Patton v. Board, etc.*, 96 Ind. 131; *Board, etc., v. Legg*, 110 Ind. 479. The fact that a bridge gives way and a traveller is injured, is not of itself sufficient to charge the county, for it must appear that the county authorities were guilty of actionable negligence. *Board, etc., v. Dombke*, 94 Ind. 72. The question, therefore, which is presented by the ruling on the demurrer to the several paragraphs of the complaint, is, does each of them sufficiently show that there was a negligent breach of duty?

The objection urged against the first paragraph of the complaint is, that the fact that the bridge was safely used for thirteen years overcomes the statement that it was negli-

The Board of Commissioners of Wabash County v. Pearson.

gently constructed of unsafe and unsuitable materials, but in our judgment this objection can not prevail. The direct statements of the pleading overcome the inference which the appellant draws from the mere isolated evidentiary fact which is found among others in the complaint.

The appellee's cause of action did not accrue until he was injured, and, although the defendant's negligence runs back to 1871, the action is not barred by the statute of limitations. The two elements of the appellee's cause of action are the legal injury and the resulting damages. *City of North Vernon v. Voegler*, 103 Ind. 314. The statute did not begin to run until the right of action accrued, and this did not accrue until the two elements came into existence. There is, therefore, no force in the argument that the acts of negligence were committed in 1871, and that the statute then commenced to run, notwithstanding the fact that the appellee was not injured until 1884.

The facts pleaded show that the appellee's injury was the proximate result of the appellant's wrong, and this is sufficient without a direct averment. *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544.

In the second paragraph of the complaint it is averred that the appellant negligently constructed the bridge of unsafe and unsuitable material, and it thus appears that the appellant itself was the wrongdoer, so that the case does not fall within the rule that a public corporation can not be liable for suffering a bridge or highway to become unsafe, unless it has notice of the defect. If the original wrong is that of the corporation itself, and is of such a nature that it endangers the safety of travellers, it is not necessary to allege that it had notice of the unsafe condition of the bridge or highway. If the negligence is in the construction of the highway or bridge, then it is not necessary to aver notice. *Board, etc., v. Bacon*, 96 Ind. 31. It must, of course, be ap-

The Board of Commissioners of Wabash County v. Pearson.

appropriately shown that ordinary care was not exercised, and where negligence is averred this is shown.

The allegation in the second paragraph that the bridge had not been inspected by a qualified inspector may be conceded to be without force and still the paragraph upheld, for if this allegation be entirely rejected there will remain facts sufficient to constitute a cause of action. It is unnecessary, therefore, to consider the effect of this allegation, although we are inclined to the opinion that it adds nothing to the complaint.

The attack on the third paragraph of the complaint can not be maintained. If a public corporation knows that a bridge or highway is unsafe because of the need of repairs, and it undertakes to repair, it must exercise ordinary care and skill. If, as is here charged, the corporation knew when it employed persons to make the repairs that they were incompetent, it did not exercise ordinary care. A corporation charged with the duty of keeping a bridge in repair must select the proper means and persons to do the work, if by the exercise of ordinary care such a selection can be made. If, however, ordinary care is used in selecting suitable persons, and in requiring the persons selected to exercise their skill with reasonable prudence and diligence, the bridge still remains unsafe, there will be no liability. *City of North Vernon v. Voegler*, 103 Ind. 314. But here the averments are that the corporation knew that the persons selected were incompetent, and knew that their work was so unskilfully and negligently done as to leave the bridge in an unsafe condition, and there is, therefore, a liability for the injury which resulted from this negligent breach of duty.

There was no error in permitting the surgeon who attended the appellee to give in evidence the statements of the appellee as to the nature and location of the pain from which he was suffering. This question has long been settled in this court. *Board, etc., v. Leggett*, 115 Ind. 544, and authorities cited; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544;

The Board of Commissioners of Wabash County v. Pearson.

Louisville, etc., R. W. Co. v. Falvey, 104 Ind. 409 ; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264.

The motion for a *venire de novo* was properly overruled. There is no imperfection in the verdict, for sufficient facts are stated to enable the court to pronounce judgment, and, under the rule which prevails in this State, the failure to find upon all the issues does not entitle a party to a *venire de novo*. *Wilson v. Hamilton*, 75 Ind. 71 ; *Jones v. Baird*, 76 Ind. 164 ; *Glantz v. City of South Bend*, 106 Ind. 305 ; 1 Works Pr., section 971, and cases cited, n. This has been the rule since the decision in *Graham v. State, ex rel.*, 66 Ind. 386, although the earlier cases declared a different rule. *Quill v. Gullivan*, 108 Ind. 235, and cases cited ; *Bartley v. Phillips*, 114 Ind. 189 ; *Indiana, etc., R. W. Co. v. Finnell*, 116 Ind. 414. In the case of *Glantz v. City of South Bend, supra*, the court referred to *Bosseker v. Cramer*, 18 Ind. 44, and some other cases, and, after showing that the doctrine of those cases had been denied in *Graham v. State, ex rel., supra*, and that the later cases approved the doctrine of that case, declared in effect that the rule as stated in *Graham v. State, ex rel., supra*, must be considered as established. The effect of the decisions has been to overrule *Bosseker v. Cramer, supra*, although the express statement that it was overruled has probably not been made. We feel bound to adhere to what has so long been the rule, and to hold, as has been so often held in recent cases, that where the verdict is perfect on its face, and so fully finds the facts as to enable the court to pronounce judgment upon it, a motion for a *venire de novo* will be denied, although the verdict may not find upon all of the issues.

Judgment affirmed.

Filed Oct. 9, 1889 ; petition for a rehearing overruled Dec. 10, 1889.

Rigler v. Rigler *et al.*

No. 14,455.

RIGLER V. RIGLER ET AL.

REVIEW OF JUDGMENT.—*For what Causes will Lie.*—A complaint to review a judgment, for error apparent on the record, will lie only for causes which would have been available on appeal.

BILL OF EXCEPTIONS.—*Presentation to Judge.*—Under the statute (section 629, R. S. 1881) a bill of exceptions does not become a part of the record unless it has been presented to the judge within the time limited, and the date of its presentation stated in the bill.

SAME.—*Excuse for not Presenting in Time.*—*Absence of Judge.*—*Affidavits.*—The Supreme Court can not consider affidavits showing the absence of the judge as an excuse for not presenting the bill of exceptions until after the time fixed had expired.

SAME.—*Insertion of Date Nunc Pro Tunc.*—In respect to presenting and signing bills of exceptions after the time limited therefor has expired, the only proper course is to make an application to the presiding judge for the insertion of the date in the bill *nunc pro tunc*.

From the Vigo Circuit Court.

C. F. McNutt, J. G. McNutt, F. A. McNutt, T. W. Harper, S. B. Davis, S. C. Davis and G. M. Davis, for appellant.

W. Eggleston, E. Reed, B. E. Rhoads, E. F. Williams and T. W. Haymond, for appellees.

MITCHELL, J.—This was a proceeding to review a judgment of the Vigo Circuit Court. It is charged in the complaint for review that there is manifest error apparent upon the face of the record of the proceedings sought to be reviewed; in that the court erred in overruling the plaintiffs' motion for a new trial, to which ruling it is alleged the plaintiffs excepted, and tendered a bill of exceptions containing all the instructions and evidence, which bill, it is averred, was signed by the court and made a part of the record. What purports to be the bill of exceptions thus alleged to have been made a part of the record in the original proceeding, together with copies of the pleadings and judgment, are made

190	431
191	138
191	168
192	390
192	462
193	617
190	431
194	503
195	295
196	97
197	280
190	431
198	000
190	431
140	636
143	358
120	431
162	263
162	264
162	267
162	268

Rigler v. Rigler et al.

a part of the complaint. The judgment was reviewed and set aside for alleged error in admitting certain testimony over the plaintiffs' objection. The propriety of the ruling of the court in holding the complaint to review sufficient on demurrer, depends upon whether or not the bill of exceptions, which purports to contain the evidence in the original case, was presented to the judge and filed so as in fact to become a part of the record.

The settled rule is, that a complaint to review a judgment for error apparent on the record will only lie for causes which would have been available on appeal. *Baker v. Ludlam*, 118 Ind. 87.

The motion for a new trial in the original case was overruled on the 18th day of May, 1887, and ninety days' time was given within which to present bills of exceptions for the signature of the presiding judge. The bill of exceptions containing the evidence was signed and filed on the 24th day of September, 1887. There is nothing in or about the bill to indicate when it was presented to the presiding judge, but attached to it is a certificate signed by the judge as follows: "Signed this 24th day of September, 1887, together with the finding of facts, upon the affidavits hereto attached and made a part hereof."

The affidavits referred to present what is claimed to be an excuse for not presenting the bill of exceptions to the presiding judge within the time limited. They show that on the 6th day of August, ten days before the expiration of the time limited for presenting the bill, the judge who presided at the trial, having no information that a bill of exceptions was being prepared to be presented to him, left his home in Terre Haute and went to Madison, Wisconsin, and that he did not return until the 30th day of the month. The absence of the judge is relied on as an excuse for not presenting the bill of exceptions until after the time had expired.

Without deciding whether or not it would be competent in any case to show by affidavits an excuse for not present-

Rigler v. Rigler *et al.*

ing a bill of exceptions, as the statute requires, we are quite sure that the affidavits show no excuse in the present case which can be considered by an appellate tribunal. *Underwood v. Hossack*, 40 Ill. 98, relied on to sustain the bill, supports the opposite view. In that case the presiding judge actually signed and filed the bill, and the Supreme Court held that it would be presumed, until the contrary appeared, that it was presented to him for his signature within the time. "But," the court added, "if the case were different, as a matter of fact, we could not help the plaintiff under this motion, as this court can not direct that to be made a matter of record which was not made so in the court below." In Illinois there was no statute requiring that the bill should show upon its face when it was presented to the judge. Our statute, section 629, is imperative upon two points: 1. The party "*must*, within such time as may be allowed, present to the judge a proper bill of exceptions." 2. "The date of the presentation shall be stated in the bill of exceptions." *Buchart v. Burger*, 115 Ind. 123; *Orton v. Tilden*, 110 Ind. 131.

A bill of exceptions does not become a part of the record unless it has been presented to the judge within the time limited, and the date of its presentation stated in the bill. When so presented, signed, and filed, it becomes a part of the record. It is not proper for an appellate tribunal to institute an inquiry or investigation outside of the record itself for the purpose of ascertaining what the record contains, or to determine whether excuses exist for not making a complete record. *Wishmier v. State, ex rel.*, 110 Ind. 523. The record must be judged by what appears upon its face.

In respect to presenting or signing bills of exceptions, after the time limited therefor has expired, the only proper course to pursue is to make an application to the presiding judge, and to have the date inserted in the bill *nunc pro tunc*. As applicable to cases of that character, it is said in *Walton v.*

Rigler v. Rigler *et al.*

United States, 9 Wheat. 651 : " But in all such cases, the bill of exceptions is signed *nunc pro tunc*, and it purports on its face to be the same as if actually reduced to form, and signed, pending the trial. And it would be a fatal error, if it were to appear otherwise." Thompson Trials, section 2810. Accordingly, it will be regarded as a fatal error if the bill does not show on its face the date of its presentation to the judge. Whether or not the facts set out in the affidavit would have justified the presiding judge in allowing the date of its presentation to be stated in the bill *nunc pro tunc*, we do not decide. What we decide is, that we can only look upon the face of the bill, and since it does not conform to the requirements of the statute, it can not be regarded as a part of the record. Whether the judge might or should have made it correct in form upon the facts stated is another question which is not presented. It is enough to say he has not seen fit to do so. The right to file bills of exception, after the close of the trial, is regulated altogether by statute, and it is not within the power of this court to add to, or take anything from, the statute by construction.

It follows that the bill of exceptions purporting to contain the evidence upon which error of law was predicated in the complaint, was no part of the record. The complaint, therefore, did not state facts sufficient, and the ruling of the court in overruling the demurrer was error.

The judgment is reversed, with costs, with directions to the court below to sustain the demurrer to the complaint.

Filed Nov. 2, 1889; petition for a rehearing overruled Dec. 12, 1889.

L'Hommedieu et al. v. Cincinnati, Wabash and Michigan R'y Co. et al.

No. 11,859.

L'HOMMEDIEU ET AL. v. CINCINNATI, WABASH AND MICHIGAN RAILWAY COMPANY ET AL.

SUPREME COURT.—*Bill of Exceptions.*—*Certificate of Official Reporter.*—Where a bill of exceptions is complete and technically correct without the certificate of the person professing to have acted as official reporter at the trial, there being nothing elsewhere in the record to indicate his official character, the certificate will not be accepted as a verity to set aside the bill of exceptions.

SAME.—*Testimony.*—*Manner of Objection for Appeal.*—*General Objection Insufficient.*—That an objection to offered testimony may be considered in the Supreme Court, it must recite with particularity wherein the testimony is objectionable, a general objection that the testimony is irrelevant, incompetent and immaterial being insufficient.

DECEDENTS' ESTATES.—*Administrator's Sale.*—*Action to Set Aside.*—*Limitation of Action.*—Where heirs seek to set aside a sale of real estate by an administrator to pay debts, under an order of a court having no jurisdiction, a right of action accrues from the time of the taking possession of the purchasers under the certificate of purchase, the statute of limitations beginning to run at the same time, and not when the sale was confirmed, it being a void sale.

SAME.—*Partition.*—*Estoppel.*—Where a complaint in a partition proceeding alleges that the decedent died intestate, leaving as his only heirs his widow and two children; that the administrator sold the estate by order of court to pay debts; that the defendants were the owners of the real estate as purchasers at the administrator's sale, subject to the rights of the plaintiff and the children, the plaintiff's interest being an undivided one-third during the natural life of the widow, these allegations put in issue the validity of the administrator's sale, and the title acquired through it; and the court having decreed partition, and the children having been adjudged to be the owners of the remainder of the widow's life estate, they are estopped from bringing an action to recover the land.

From the Madison Circuit Court.

H. D. Thompson, T. B. Orr, M. S. Robinson and J. W. Lovett, for appellants.

C. L. Henry and H. C. Ryan, for appellees.

190	435
195	115
196	187
197	88
197	409
120	435
181	421
120	435
138	632
120	435
145	48
120	435
148	396

L'Hommedieu et al. v. Cincinnati, Wabash and Michigan R'y Co. et al.

BERKSHIRE, J.—The appellants, who were the plaintiffs in the court below, filed their complaint in three paragraphs. The first and second were for the recovery of the possession of real property, and the third a paragraph to quiet title to the same real estate.

One of the appellees filed a disclaimer, another filed an answer in two paragraphs, and all the rest pleaded the general denial only.

There was a trial by the court and a finding and judgment for the appellees.

The only error assigned is the overruling of the motion for a new trial.

The appellees file a third brief, which is of recent date, when we compare the date at which it was filed with the dates at which other briefs were filed. In this brief the point is made that the evidence is not in the record, and therefore the questions which would otherwise be presented are not before us for consideration.

This objection is purely technical, and coming as late as it does ought not to be regarded with very much favor; but, at the same time, if we felt that the objection was well taken, we would not be at liberty to disregard it.

The bill of exceptions, however, is complete and technically correct without the certificate of the person who professes to have acted as official reporter at the trial, and there being nothing elsewhere in the record to indicate his official character, we are not inclined to accept the certificate as a verity and set aside the bill of exceptions. This conclusion is not in conflict with the ruling in *Lyon v. Davis*, 111 Ind. 384, and other cases cited; but, if so, it agrees with the later case of *McCormick, etc., Co. v. Gray*, 114 Ind. 340, which modifies the former case.

There are several reasons assigned in the motion for a new trial. All of them, from four to fifteen, inclusive, relate to the admission of testimony over the objections of the appellants.

L'Hommedieu et al. v. Cincinnati, Wabash and Michigan R'y Co. et al.

The practice has been long and well settled in this State (the cases so often collected and cited that we do not feel called on to cite them in this opinion) that to entitle an objection to offered testimony to consideration in this court, it must recite with particularity the reasons which indicate that the testimony is not competent, and that a general objection, such as the testimony is irrelevant, immaterial and incompetent, is unavailing. As the reasons in the motion for a new trial, to which we have called attention, all depend on the one general reason, viz., the testimony is irrelevant, immaterial and incompetent, we must disregard them.

There are several important questions presented by the remaining reasons assigned, but as our conclusion as to two of these questions will dispose of the case, and must affirm the judgment, we do not know of any good purpose to be subserved by considering and passing upon others.

It is disclosed by the record that Michael Ryan died in Butler county, Ohio, October 23d, 1861, seized in fee simple of the real estate, the title to which is in controversy in this action. He died intestate, and left as his heirs at law Mary S. Ryan, his widow and second wife, and by whom he had no children, and two children by his first wife, the appellants in this action.

On the 28th day of October, in the year of his death, Thomas Moore and Mary S. Ryan, the widow, were, by the probate court of said Butler county, granted letters of administration on his estate.

At the May term, 1862, of the common pleas court within and for the county of Madison and State of Indiana, that being the county wherein is situated the said real estate, the said Moore, as administrator, filed his petition and obtained an order for the sale of the said real estate for the payment of debts. After obtaining the order, he laid out and platted the said real estate as Moore's addition to the town of Anderson, whether with or without the approval of the court is not important to our conclusion.

L'Hommedieu et al. v. Cincinnati, Wabash and Michigan R'y Co. et al.

After the said real estate had been platted and laid out into lots and streets and alleys, he sold the same to different persons, and reported the sales to the court; the court approved what he had done; the sales were confirmed and deeds made and approved. The sales that were made not only included the lots proper, but also the streets and alleys, for in this state the purchaser of a town lot acquires title to the center of the streets and alleys on which it borders, burdened with the easement. The sale was made on the 27th day of June, 1862, and the purchasers on that day took possession of the said tracts, or parcels, purchased by them respectively, and the sales so made were confirmed, and deeds made and approved at the January term, 1863, of said court. At the time of the proceedings and sale in question, section 211, p. 158, 2 G. & H., was in force. Clauses four and five of this section read as follows:

“*Fourth.* For the recovery of real property sold by executors, administrators, guardians or commissioners of a court, upon a judgment specially directing the sale of property sought to be recovered, brought by a party to the judgment, his heirs, or any person claiming title under a party, acquired after the date of the judgment—within five years after the sale is confirmed.

“*Fifth.* Upon contracts in writing, judgments of a court of record, and for the recovery of the possession of real estate—within twenty years.”

We do not care at this time to determine whether the case, as presented, is within the fourth clause of the section or not, as we have come to the conclusion that it is within the fifth clause and was thereby barred at the time of the commencement of this action, which was on November 23d, 1882.

If the court of common pleas had no jurisdiction over the subject-matter of the petition of Moore, as administrator, to sell the real estate, then the proceedings were void, and it is conceded that no such jurisdiction existed. The proceedings being void, the title and right to the possession of

L'Hommedieu et al. v. Cincinnati, Wabash and Michigan R'y Co. et al.

the real estate were in the appellants at all times after the death of their father, and when the purchasers at the administrator's sale went into possession, their possession was wrongful, and the appellants had then and there a right of action against them for the possession. They had no greater or better right of action after the sale had been confirmed by the court and the deeds made than they had before. The purchasers went into possession under claim of right by virtue of their certificates, which was hostile and adverse to the appellants, and they followed up this claim by afterwards procuring color of title, if the certificates did not give them such color. It was not necessary, however, for the appellees, and those under whom they claim, to have color of title during the period of limitation, to give to them the benefit of the statute; but sufficient that the character of their occupancy was such that during a period of twenty years anterior to the bringing of this action the appellants had a right of action. *Vanduwyn v. Hepner*, 45 Ind. 589; *State v. Portsmouth Savings Bank*, 106 Ind. 435, 461; *Roots v. Beck*, 109 Ind. 472.

The widow inherited an undivided one-third of the real estate in question, during her natural life, from Michael Ryan, her husband; the appellants inherited the fee simple, including the remainder over covered by the widow's life estate. After the real estate was platted by the administrator Moore, as an addition to the town of Anderson, and probably after the administrator's sale of the two-thirds which descended to the appellants unincumbered by the widow's life estate, she conveyed her life estate to George Holland, except as to two of the lots which she had theretofore conveyed to Joseph Deboy. Holland conveyed the interest which he had acquired from the widow to John T. Hayden, and, in the year 1872, Hayden brought an action in partition against all parties who claimed an interest in the real estate, including the appellants, and during the pendency of the said partition proceedings the appellants appeared thereto and filed excep-

L'Hommedieu et al. v. Cincinnati, Wabash and Michigan R'y Co. et al.

tions to the first report made by the commissioners appointed to separate and part the real estate, and the court having sustained said exceptions, and the commissioners having made partition anew and reported the same to the court, the appellants appeared further and filed exceptions, which were by the court overruled, and thereupon they filed a bill of exceptions. The last report of the commissioners having been confirmed by the court, judgment was rendered making firm and effectual the partition as made by the commissioners, and as to that part of the real estate reported not susceptible of division, it was ordered sold, and a commissioner appointed to make the sale, and the sale having been made and reported to the court the same was approved, deeds made and approved to the respective purchasers, and the proceeds of the sale distributed. The appellants having been adjudged to be the owners of the remainder, covered by the widow's life estate, they received their distributive share of the proceed of the sale as determined by the court.

It is contended by the appellants that the title of the appellants to the undivided two-thirds of the real estate not covered by the widow's life estate, and for which they are now contending, was not put in issue, and was not involved in the action in partition, and that the judgment in that case does not work an estoppel in this action. We are of a different opinion. It was alleged by Hayden, in his complaint, that Michael Ryan died in the year 1861, the owner of the said real estate, and intestate, leaving as his only heirs his widow, Mary S. Ryan, who was a second wife, and two children by a former marriage (the appellants); that one Moore, as his administrator, sold the said real estate by order of the Madison Circuit Court, after having platted the same as an addition to the town of Anderson, for the payment of debts, and that the defendants to the action (except the appellants) were the owners of the said real estate in fee simple as purchasers at the administrator's sale, or as grantees

L'Hommedieu et al. v. Cincinnati, Wabash and Michigan R'y Co. et al.

from such purchasers subject to the rights of the plaintiffs and the said children, naming them (the appellants), and it was alleged that the plaintiff's interest was that of an undivided one-third during the natural life of the said widow, Mary S. Ryan. These allegations put the question as to the validity of the administrator's sale squarely in issue, as well as the title acquired through that sale. The complaint alleged a tenancy in common and gave the source of title.

The source of title alleged as to all of the defendants, except the appellants, being the administrator's sale, and the court having found and adjudged the title as alleged, the validity of the sale was necessarily involved and determined. We are referred to the following cases in this court: *Miller v. Noble*, 86 Ind. 527; *Utterback v. Terhune*, 75 Ind. 363; *Avery v. Akins*, 74 Ind. 283; and see *Fleenor v. Driskill*, 97 Ind. 27; *Woolery v. Grayson*, 110 Ind. 149; *Spencer v. McGonagle*, 107 Ind. 410; *Luntz v. Greve*, 102 Ind. 173.

In our opinion counsel for appellants, to some extent, misapprehend the force of those cases. They do not go so far as to hold that where the source of title is alleged, and the title itself put in issue, as in the case under consideration, the judgment is not conclusive as to the interests and titles of the parties.

Judgment affirmed, with costs.

Filed Sept. 28, 1889; petition for a rehearing overruled Dec. 13, 1889.

Board of Comm'rs of St. Joseph Co. v. The State, *ex rel.* Michener, Att'y Gen'l.

130	449
133	843

No. 14,892.

**BOARD OF COMMISSIONERS OF ST. JOSEPH COUNTY v. THE
STATE, EX REL. MICHENER, ATTORNEY GENERAL.**

SCHOOL LAND.—*Proceeds of Sale.*—*Deferred Payments.*—*Liability of County for Interest.*—Under section 4346, R. S. 1881, which provides that the deferred payments, as well as the one-fourth of the purchase-money to be paid in advance on lands set apart to the school fund by act of Congress and sold by authority of the Legislature, "shall be regarded as part of the congressional school fund," the county is chargeable with interest on the entire amount of the price of the land, and the default of a purchaser of the land in paying deferred installments, and the consequent forfeiture of the land to the school fund, does not relieve the county of liability for interest on the full amount.

From the St. Joseph Circuit Court.

J. E. Howard, for appellant.

L. T. Michener, Attorney General, *J. H. Gillett* and *L. Hubbard*, for the State.

ELLIOTT, C. J.—Within the county of St. Joseph are lands which were set apart to the school fund by the act of Congress; these lands were sold by the county authorities for \$13,750, of which amount one-fourth was paid in cash, and the remainder of the purchase-money was secured by mortgage. The whole amount for which the lands were sold was reported, as the law requires, to the superintendent of public instruction, and the county was charged with it. The purchase-money was not paid, and the lands were forfeited. The question which we are required to decide is this: Is the county chargeable with interest on the entire amount of the price of the land, or only upon the amount received in cash?

The case is governed by section 4346, R. S. 1881, which reads thus: "One-fourth of the purchase-money shall be

Board of Comm'rs of St. Joseph Co. v. The State, *ex rel.* Michener, Att'y Gen'l.

paid in hand and the interest for the residue for one year in advance, and the residue in ten years from such sale, with like interest annually in advance; and deferred payments shall be regarded as part of the congressional township school fund, and reported as such by the auditor to the superintendent of public instruction." We can discover neither obscurity nor ambiguity in this statute, and there is no room for construction. Where the words of a statute are free from obscurity or ambiguity, nothing remains but to enforce them as they are written. We can not conceive how it is possible to choose words that would more plainly convey the meaning that the unpaid purchase-money is a part of the congressional township school fund. The words are: "and deferred payments shall be regarded as part of the congressional school fund," and "shall be reported as such." The deferred payments go into the fund as part and parcel of it. From this conclusion there is no escape, save by striking out the words of the Legislature and substituting others for them, and this no court would dream of doing.

Counties are public corporations, and over them the legislative authority is very great and extensive. The Legislature, in the exercise of this authority may, undoubtedly, charge them with the care of school lands and school funds, and impose upon them hard and unreasonable burdens. The courts can not interfere, however much they may doubt the policy of the legislative action, unless some constitutional limitation is disregarded. In this instance the Legislature empowered counties to sell the land, and commanded that the unpaid purchase-money, as well as the purchase-money paid, should be "regarded as part of the congressional school fund." If the court should hold that the unpaid purchase-money is not part of the fund, it would simply declare that the deferred payments shall not be regarded as part of that fund. What the Legislature says shall be regarded as a part of the fund is a part of it, and so it must be adjudged, notwithstanding the fact that ill effects and confusion may result.

The Phoenix Insurance Company of Brooklyn v. Stark.

If such a result will follow, the courts can not avoid it, for the remedy is with the Legislature and not the courts.

Judgment affirmed.

Filed Oct. 29, 1889.

120	444
127	543
120	444
122	451
133	117
120	444
163	382

No. 13,498.

THE PHOENIX INSURANCE COMPANY OF BROOKLYN v.
STARK.

INSURANCE.—Action on Policy.—Pleading.—Property Insured.—Allegation of Ownership.—A complaint on a policy of insurance containing a provision that "if the assured shall not be the sole and unconditional owner in fee of said property then this policy shall be void" is sufficient, in the absence of a motion to make more specific, if it avers generally that the plaintiff was the owner of the property insured.

SAME.—Application.—Filing with Complaint.—In an action on an insurance policy, it is not necessary to file with the complaint a copy of the application on which the policy was issued.

SAME.—Agent.—Filing Application.—Scope of Authority.—An agent of an insurance company authorized to solicit and take applications for insurance is acting within the scope of his authority in preparing such applications, and if in doing so he fraudulently inserts false answers to interrogatories, without the knowledge or fault of the applicant, the company, and not the insured, must suffer.

From the Vigo Circuit Court.

J. M. McCabe, E. F. McCabe and H. B. Jones, for appellant.

B. F. Havens, S. C. Davis, S. B. Davis and H. C. Nevitt, for appellee.

COFFEY, J.—This was an action, in the usual form, on a

The Phoenix Insurance Company of Brooklyn v. Stark.

policy of insurance, executed by the appellant to the appellee, insuring him against loss by fire on his dwelling-house and the household goods therein contained.

The appellant answered in five paragraphs, the first being a general denial.

The second avers that the policy was issued upon a written application made by the appellee, and taken by a special agent with limited powers to take and forward applications for insurance only, and that in said application the appellee represented and warranted that there was no encumbrance on the land upon which said dwelling-house was situated, whereas in truth and in fact there was then and there a mortgage for the sum of \$1,400 to R. H. Cochran, which was a valid subsisting lien upon said land, by reason of which said policy of insurance is void.

The third paragraph avers that the policy in suit was issued upon the faith of a written application made by the appellee, taken by the agent mentioned in the second paragraph of the answer, and that in said application the appellee represented and warranted that the land whereon said dwelling-house was situated was of the value of \$50 per acre, whereas in truth and in fact said land was worth the sum of \$35 per acre, and no more, by reason of which said policy is void.

The fourth paragraph of the answer avers that the policy of insurance in suit was issued upon a written application made therefor by the appellee, taken by the agent named in the second paragraph of the answer, and that in said application the appellee represented and warranted that the said house was only four years old, whereas in truth and in fact said house was eight years old, by reason of which said policy of insurance is void.

The fifth paragraph is the same as the others so far as it relates to taking the written application for the policy, and avers that in said application the appellee represented and warranted that said house was then of the cash value of \$1,-

The Phoenix Insurance Company of Brooklyn v. Stark.

200, whereas in truth and in fact it was of the value of \$800, and no more, by reason of which the policy in suit is void.

The appellee replied to these several answers in two paragraphs, the first being a general denial.

The second paragraph is in the nature of a special *non est factum* to the application set out with the answers, and avers, in substance, that said application was brought to the appellee by one T. W. Howard, the agent of the appellant, in the form of a printed blank, who read the same over to the appellee; that he answered the questions therein contained truly and correctly; the said agent undertaking and promising to write the said answers correctly, and undertook to fill out said application; that he answered that said house was, in his judgment, worth about \$800, and that the same was about eight years old; that the real estate upon which said house was situated was encumbered by a mortgage to the amount of \$1,400, and that said land was, in his judgment, of the value of \$— per acre; and that said agent then and there informed the appellee that it was wholly unnecessary to answer said questions, and then and there left the blanks for the answers of said questions wholly unfilled and blank; that the appellee, being wholly ignorant of such business, relied upon the statements of said agent, and did not require said blanks to be filled; that he had no knowledge of any limitation on the power of said agent; and that said application was so blank when he signed and delivered the same to said agent; that he never afterwards authorized any one for him to fill said blanks with the words which appear therein, or in any other manner; that said answers have been written therein since he signed and delivered said application, and while the same was in the possession of the appellant, without his knowledge or consent, and that all such answers are as to him false and fraudulent; that the appellant accepted said application so signed by him as aforesaid and issued to him the policy in suit with full knowledge of all the facts aforesaid, and that said blanks were in said

The Phoenix Insurance Company of Brooklyn v. Stark.

application unfilled when he signed the same, and that he had fully and truly informed appellant's agent as to all said facts, and with said knowledge received, and has ever since retained, appellee's money paid as a premium for said insurance, and still retains the same. Wherefore, etc.

This reply is sworn to by the appellee. A trial of the cause, before a jury, resulted in a verdict for the appellee, upon which the court rendered judgment. No motion for a new trial was filed.

The assignment of errors calls in question the sufficiency of the complaint in the cause, and the sufficiency of the second paragraph of the reply.

The policy of insurance before us contains a provision to the effect that "if the assured shall not be the sole and unconditional owner in fee of said property then this policy shall be void," and it is contended by the appellant that the complaint is bad because it does not aver that the plaintiff was the sole and absolute owner of the property covered by the policy in suit. The complaint does aver that appellee was the owner of the property destroyed at the time the policy of insurance was issued and at the time of its destruction.

In the case of *Dow v. Gould & Curry, etc., Co.*, 31 Cal. 629, it was said that an owner is he who has dominion of a thing real or personal, corporeal or incorporeal, which he has a right to enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.

In the case of *Converse v. Kellogg*, 7 Barb. (N. Y.) 590, it is said that ownership is the right by which a thing belongs to an individual, to the exclusion of all other persons.

Without entering into a discussion as to whether these definitions are strictly accurate, in the absence of a motion to make the complaint more specific, we think that the general allegation in the complaint that the appellee was the owner of the property insured, was sufficient. *Phoenix Ins.*

The Phoenix Insurance Company of Brooklyn v. Stark.

Co., etc., v. Pickel, 119 Ind. 155; *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202.

It is further urged that the complaint is defective in not setting out a copy of the application upon which the policy in suit was issued, but it is now settled in this State that it is not necessary to file a copy of the application with the complaint. *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352; *Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264; *Continental Life Ins. Co. v. Kessler*, 84 Ind. 310; *Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212.

It is also contended that the complaint is bad in not alleging that the policy in suit was issued upon a consideration, but it does appear from the complaint, and the policy filed therewith, that the appellee executed his note for the agreed premium, which he subsequently paid. In our opinion the complaint in controversy states a cause of action against the appellant, and is not defective for the reasons urged against it in this court.

It remains to inquire whether the second paragraph of the reply is sufficient.

Where an agent is authorized to solicit and take applications for insurance, it must be held that he is acting within the scope of his authority in preparing such applications, and if in doing so he fraudulently inserts false answers to interrogatories, without the knowledge or fault of the applicant, the company giving such agent employment must suffer, and not the insured, who is without fault. *Pickel v. Phoenix Ins. Co.*, 119 Ind. 291, and authorities there cited.

This case does not fall within the rule announced in *Cox v. Aetna Ins. Co.*, 29 Ind. 586. It can not be successfully maintained that a party should be required to prosecute a suit to reform an instrument of writing which was not under his control and which he never executed.

In the case of *Phoenix Ins. Co. v. Allen*, 109 Ind. 273, the agent who took the application for insurance wrote therein

 Bohr v. Neuenschwander.

a false description of the location of the property without the knowledge or consent of the insured, and in commenting on that fact this court said: "If this misdescription of the location of the personal property was so written into the application, without the knowledge or consent of the plaintiffs, it was a fact which they were entitled to aver in their complaint and prove at the trial, without asking a reformation either of the application or of the policy of insurance issued upon it. The writing into the application the alleged misdescription in question by the defendant's agent, without the knowledge or consent of the plaintiffs, estopped the defendant from setting up such misdescription as a defence to the action. These general principles governing actions on policies of insurance are well recognized by numerous authorities." Then follows a list of authorities which we think fully sustain the language used by the court as above quoted. In our opinion the reply in this case was sufficient.

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed Oct. 29, 1889.

 No. 13,002.

BOHR v. NEUENSCHWANDER.

DRAINAGE—Procedure.—Commissioner.—Failure to Report.—Effect of.—

Where a petition was filed under the drainage act of 1883, and the requisite notice given, and the drainage commissioners were unable to report on the day designated by reason of the term-time of the court having been changed by legislative act,

VOL. 120.—29

190	449
122	8
120	449
131	441
120	449
152	248
120	449
156	656
120	449
180	521

120	449
169	75

Bohr v. Neuenschwander.

Held, that under sections 1325, 1326 and 1327, R. S. 1881, and a saving clause in the legislative act, a motion to discontinue the petition was properly overruled.

SAME.—*Commissioners' Report.*—*Discontinuance of Petition.*—Independently of the statutory provisions, the failure of the commissioners to report at the time designated will not discontinue the petition, the petitioner being without fault.

SAME.—*Report.*—*Extension of Time.*—*Who may ask for.*—When it becomes evident before the designated day that the commissioners will be unable to file their report, any of the parties interested may ask an extension of time, which the court may grant, a request from the commissioners being unnecessary.

SAME.—*Clerk of Court.*—*Petition and Order Fixing Report Day.*—*Failure of Clerk to Deliver to Commissioners.*—The failure of the clerk to deliver to the commissioners a copy of the petition and order fixing the time at which they should report, does not vitiate their report.

SAME.—*Testimony.*—*Witness's Opinion.*—A question as to whether, from an examination the witness had made of a certain creek, it had sufficient fall to drain the remonstrant's land, is inadmissible, as calling for the witness's opinion, and not for facts within his knowledge.

SAME.—*Evidence.*—*Commissioners' Report.*—*Remonstrant.*—The report of the commissioners of drainage is inadmissible in evidence in a proceeding where a remonstrant in the circuit court is contesting both the report and the petition.

VERDICT.—*Motion to Set Aside.*—*Venire de Novo.*—*Appeal.*—In the absence of a motion to set aside a verdict, or a demand for a *venire de novo*, a finding of the court so defective as not to justify the court in rendering judgment upon it can not be corrected by appeal.

SAME.—*Motion for New Trial.*—*Defective Verdict.*—A motion for a new trial does not reach a defect in the form of the verdict.

From the Wells Circuit Court.

A. N. Martin and H. L. Martin, for appellant.

J. S. Dailey, L. Mock and A. Simmons, for appellee.

BERKSHIRE, J.—This is a proceeding under what is known as the Drainage Act, approved April 8, 1881, as it was amended by the act approved March 8, 1883, and which later act is found in Elliott's Supplement, beginning with section 1175.

The petition was filed on the 15th day of January, 1885. The specifications given in the petition for the improvement

are; (1) that public health will be promoted; (2) that a certain public highway, therein described, will be benefited, and (3) that the improvement will be of public utility.

The petition was docketed as an action pending by order of the court, February 9, 1885, and on the 12th day of said month it was referred to the commissioners of drainage, and they were ordered to meet on the 14th day of said month, and to make their report to the court on the third Tuesday therein.

On the 16th, which was two days before the time designated for the said commissioners to make their report, upon the petitioners' motion the court made an order extending the time, and designated April 28th, 1885, as the day on which the report should be made. The commissioners did not make their report on that day, and had not done so on the 12th day of May following, on which day the appellant moved for a judgment discontinuing the petition; this motion the court overruled, and the appellant excepted. On the following day the commissioners made their report, which, on motion of the appellee, was referred back to them, and the 26th day of said month designated as the day when they should report. To this order the appellant made no objection.

On said last named day the commissioners made their report, and the appellant moved its rejection, filing several written reasons therefor. This motion the court overruled, and he excepted. He then filed a remonstrance, alleging several causes, some of which only brought in question the sufficiency of the report, while others stated matters in bar of the petition.

Upon the remonstrance being filed, the cause was submitted to the court for trial, and, after hearing the evidence, it found as follows:

"The court finds for the petitioner, that the assessments made on the lands of the remonstrant, Isaac Bohr, are just and equitable."

Bohr v. Neuenschwander.

The appellant then filed his motion for a new trial, which was overruled by the court, and he excepted, after which the court rendered judgment confirming the report of the commissioners.

Numerous errors are assigned, but it does not become necessary for us to notice each specifically.

The court committed no error in refusing to discontinue the petition.

The act of 1883 was in force when the petition was filed and the commissioners appointed, and although repealed by the act approved April 8th, 1885, as to all future drainage proceedings that might be instituted, was continued in force as to all pending proceedings. This act required the petitioner to file his petition in the office of the clerk of the court, noting thereon the date at which it should be docketed, and then to give the required notice, and much like the plaintiff in an ordinary action is required to do when he commences his action during the term; and on the day noted it becomes the duty of the court, if satisfied that the proper notice has been given, to order the petition docketed as an action pending therein.

The petition having been thus docketed becomes a pending action, made so by law, and governed by the same rules of procedure that govern other pending actions, except as specially otherwise provided. And as there is no special provision as to discontinuances in this class of cases, the statutory provisions on that subject applicable to all pending actions must be applied. These are as follows:

"Section 1325, R. S. 1881. There shall be no discontinuance of any suit, process, matter, or proceeding whatever, returnable to or pending in any circuit court, by reason of a failure of the Judge to attend on the first or any other day of the term.

"Section 1326. If a court shall not sit in any term, all matters pending therein shall stand continued until the next term.

Bohr v. Neuenschwander.

“Section 1327. If at the end of the term of any Court, any matters pending therein are undetermined, the same shall stand continued until the next term.”

It would seem that these sections are broad enough to meet the contention of the appellant. But the report which the commissioners were required to make had to be made to the court, and could not be made to the judge, and could, therefore, only be made when court was in session.

The time for holding the courts in Wells county was changed by an act of the Legislature, approved March 3d, 1885, and as the result there was no court in session on the 28th day of April, 1885, hence the commissioners could not report on that day. It can hardly be claimed that this change in the law, even without a saving clause, or any other statute on the subject, would have the effect to discontinue pending actions. But section 11, of the said act of March 3d, contained an ample saving clause, and as the result thereof one of two conclusions must follow, either that it became the duty of the court, if requested so to do within a reasonable time by any of the parties interested, to designate another time for the commissioners to make their report, or else they might report within a reasonable time without such order, and in either case the appellant's motion was properly overruled. But, independently of the statutory provisions to which we have called attention, the failure of the commissioners to report at the time designated will not discontinue the petition.

We can imagine no good reason why it should; it may become evident before the arrival of the day designated that the commissioners will not be able to file their report, and in that event, if any one or more of the parties interested appears and asks that further time be granted in advance, or if, on a designated day, or within a reasonable time thereafter, such request is made, we are unable to discover any good reason why the court might not grant the request and fix another day for them to report.

Bohr v. Neuenschwander.

The failure of the commissioners to perform their duty should not work to the prejudice of the petitioners.

It is contended by the appellant that another time can not be fixed for the commissioners to make their report, except that on the day designated the commissioners themselves appear in court and ask for further time.

We find no such provision in the statute, and, as we have already said, we can imagine no good reason why any party interested might not ask that such an order be made. It occurs to us that it can be claimed with as much plausibility that if commissioners appointed to make partition of real estate in actions of partition, fail to report at the time designated, the failure will discontinue the action. In such a case what would be the court's action? Upon the application of any party interested, if not upon its own motion, it would designate another time for the same commissioners to report, or remove them and appoint others, and designate a time for them to report.

In what we have said we have taken it as granted that the petitioners are not at fault, and act with reasonable promptness. If the commissioners fail to make their report at the time designated, and that failure rests upon any fault or wrong of the petitioners, then the court might, no doubt, in the exercise of its discretionary powers, dismiss the petition, and it might do so when the petitioners were not in fault if they fail to act with reasonable promptness when the commissioners have failed to perform their duty. This is what is decided in the cases of *Claybaugh v. Baltimore, etc., R. W. Co.*, 108 Ind. 262, and *Munson v. Blake*, 101 Ind. 78, and all that is decided.

We quote from the opinion in the first case named: "If the drainage commissioners do not report at the time designated, it may be that the petitioners could avert a dismissal by appearing at that time and asking an order against the commissioners; but, however this may be, they can not sub-

sequently come into court, and, as of right, obtain such an order."

The facts in that case were, in substance, as follows: The commissioners were ordered to report on the third Thursday in December, 1884, which they failed to do, and on the 12th day of March, 1885, they appeared in court and requested that another time be fixed; their request was granted, and the 6th day of the following June designated; on the 24th day of said month of June, said commissioners, not having filed any report, again appeared and requested that still another time be fixed; but the court refused to grant their request, and, on motion of the appellee, dismissed the petition.

Whether the failure of the appellant to object to the order of the court, made on the 13th day of May, 1885, refusing to receive and act upon the report, but referring the same back to the commissioners with directions for them to report at another day named, was a waiver by the appellant of any right to have the petition dismissed we are not called upon to decide, for, as we have seen, he at no time had any such right; but see *Munson v. Blake, supra*.

The act of 1883 not having been repealed as to pending proceedings commenced before the passage of the act of 1885, the powers and duties of commissioners appointed under the former act were continued as to such pending proceedings.

The failure of the clerk of the court to perform the ministerial duty of delivering to the commissioners a copy of the petition and order fixing the time at which they should report did not vitiate their report; that was, at most, a mere irregularity.

The court committed no error in sustaining the objection to the question propounded to the witness, A. T. Stewart, as follows: "State what the fact is as to whether or not, from the examination you made yesterday of that creek, it appeared to have sufficient fall to drain Mr. Bohr's forty acres."

The question called for the witness's opinion, and not for

Bohr v. Neuenschwander.

facts within his knowledge ; besides it was an inquiry for the opinion of the witness relating to an issuable fact ; one that could not be withdrawn from the court and submitted to the witness.

The court committed no error in admitting the testimony of the witness Taylor Barton as to the conversation which he held with the appellant.

The testimony was for the purpose of proving declarations made by the appellant against his interest relating to the subject-matter involved in this litigation, and was therefore competent.

The finding of the court was a general, and not a special, finding, and was radically defective, and did not respond to the issues which the court was called upon to determine ; it was wholly insufficient for any purpose ; it was so defective as not to justify the court in rendering judgment upon it.

In the case of *Keller v. Boatman*, 49 Ind. 104, the learned judge delivering the opinion said of the verdict of the jury: "The words, 'We, the jury, find that plaintiff had a right to replevy the mill,' amounts to no more than a conclusion of law, which the jury could not decide. They express no fact on which such a judgment could be rendered." The judgment rendered was for possession of the mill in controversy.

In *Ridenour v. Beekman*, 68 Ind. 236, the verdict of the jury was in the following form: "We, the jury, find the property was replevied in Miami county, and at the commencement of this suit the right of and possession thereto was in the plaintiff, and assess his damages at twenty-five dollars."

In that case, the learned judge delivering the opinion, said: "We are of the opinion that the verdict was radically defective, and did not justify the rendition of any judgment, and, therefore, that the motion for a *venire de novo* should have prevailed. The verdict does not, in terms, find the issue joined between the parties either one way or the other."

A verdict must answer all the material points in issue.

Bohr v. Neuenschwander.

Cranch v. Martin, 3 Blackf. 256. See *Scraper v. Pipes*, 59 Ind. 158.

But the question as to the defect in the finding is not properly in the record, and therefore the appellant can not have the error corrected by this appeal. He did not move in the court below to set aside the verdict, nor did he ask that a *venire de novo* be awarded. *Moore v. Read*, 1 Blackf. 176; *Tardy v. Howard*, 12 Ind. 404; *Anderson v. Donnell*, 66 Ind. 150.

A motion for a new trial does not reach a defect in the form of the verdict. *Bosseker v. Cramer*, 18 Ind. 44; *Bell v. State*, 42 Ind. 335; *Anderson v. Donnell*, *supra*; *Green v. Elliott*, 86 Ind. 53; *Bunnell v. Bunnell*, 93 Ind. 595; *Carver v. Carver*, 83 Ind. 368; *Thayer v. Burger*, 100 Ind. 262; *Cottrell v. Shadley*, 77 Ind. 348; *Ridenour v. Miller*, 83 Ind. 208; *Bartley v. Phillips*, 114 Ind. 189.

But the court erred in admitting in evidence the report of the commissioners. By his remonstrance the appellant joined issue upon the report as well as upon the petition. *Elliott's Suppl.*, section 1177.

It is true, as contended by counsel for the appellee, that the report was before the court as a paper in the case, but it was not before it as a piece of evidence in the case. In determining the questions at issue the court could not consider the report as evidence, unless introduced in evidence, any more than it could consider the statements found in any pleading or paper relating to the issues of any case which might come before it for trial. But when introduced in evidence it was before the court for consideration with other evidence in the case. When the court overruled the appellant's objection, and allowed the commissioners' report to be read in evidence, this was a decision that it was competent evidence; and if competent evidence, when the court came to make up its finding it was its duty to consider it and weigh it as a part of the evidence in the case, and we must presume that it did so weigh and consider it.

Bohr v. Neuenschwander.

We can see no distinction in principle between the introduction of the report in this case from that of viewers in proceedings to establish a highway appealed from the board of commissioners to the circuit court, or the report of the appraisers where there has been an appeal to the circuit court from the board of commissioners in a proceeding to establish a ditch or drain. In either case the report is not competent evidence. The commissioners, appraisers, or viewers are competent witnesses, and may give original testimony.

In *Coyner v. Boyd*, 55 Ind. 166, the learned judge who delivered the opinion said: "The questions in issue on appeal were questions of fact, such as, whether the proposed road was of public utility, whether it ran through the appellant's enclosure, etc., and whether he was entitled to damages, and, if so, how much? Upon these questions, the reports of the viewers and reviewers were but the embodiment of the conclusions at which they had arrived. It was the province of the jury, in trying the cause on appeal, to determine the questions involved from competent evidence laid before them, and not from the conclusions of viewers or reviewers upon the same questions. As well might it be said that the verdict of a jury on the trial of a cause before a justice of the peace would be competent evidence to prove the facts of the case on the trial of the cause on appeal to the circuit court."

This language applies with as much force to the present case as in the case in which the opinion from which it is taken was delivered.

In the case of *McKinsey v. Bowman*, 58 Ind. 88, the learned judge delivering the opinion says: "The report of the appraisers was one of the papers in the case upon which the trial was founded; it was not an instrument of evidence in its own support." The same is exactly true of the report of the commissioners in the present case. See *Freck v. Christian*, 55 Ind. 320; *Beck v. Pavey*, 69 Ind. 304; *Corey v. Swagger*, 74 Ind. 211.

Westhafer v. Patterson.

Because of the error in admitting the report of the commissioners in evidence, the judgment must be reversed.

Judgment reversed, with costs.

Filed Oct. 29, 1889.

No. 13,746.

WESTHAFER v. PATTERSON.

CONTRACT.—Rescission.—Action to Set Aside Conveyance.—Reconveyance of Consideration.—Where a plaintiff seeks to set aside a conveyance of land to defendant, alleging that his grantor's title to the land which was the consideration of the conveyance, purchased by the defendant but not conveyed, was defective for non-conformity in the execution and acknowledgment of his deed with the law of Tennessee, of which the grantor was a resident, he will not be permitted to rescind his contract in the absence of an offer to reconvey, the formal defects complained of not rendering the title void.

SAME.—Rescission.—A person will not be permitted to rescind a contract in order to reclaim what he has parted with and to retain what he has received in the transaction.

DEED.—Acknowledgment.—Defective Certificate.—Who may Take Advantage of.—As a general rule, only subsequent purchasers for value can take advantage of the omission of words of identification, or other formal defects in the certificate of acknowledgment.

From the Martin Circuit Court.

T. J. Brooks and S. M. Reeve, for appellant.

E. Moser and H. Q. Houghton, for appellee.

MITCHELL, J.—The propriety of the ruling of the circuit court in sustaining a demurrer to the complaint is the only question involved in this appeal. Westhafer charged in his complaint that he had conveyed certain real estate, in the

190	459
126	154
190	459
135	290
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141	480
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154	194

Westhafer v. Patterson.

State of Indiana, of which he was the owner, to the defendant Patterson, and that by agreement he received as a consideration for the conveyance made by him a deed of conveyance from one John M. Nickless, which purported to convey to the plaintiff certain real estate in the State of Tennessee, which the defendant Patterson had purchased from Nickless, but which the latter had never conveyed. It is alleged that John M. Nickless, the plaintiff's grantor, derived his title to the Tennessee land through a deed executed by William Nickless and wife, which latter deed the plaintiff avers was not executed and acknowledged in conformity with the statutes of the State of Tennessee, certain sections of which are set out in the complaint. These statutes require the officer before whom a deed is acknowledged to state in his certificate that he is personally acquainted with the grantor, and also to annex to any deed, in which a husband and wife join, a certificate to the effect that the wife appeared before him privately, and apart from her husband, and acknowledged the deed freely, voluntarily, etc. It is alleged that the requirements of the foregoing statutes were not observed in the respects above mentioned, in the acknowledgment, or the certificate endorsed upon or annexed to the conveyance from William Nickless and wife to the plaintiff's grantor, John M. Nickless. Without alleging any other infirmity in the deed, or defect in the title, the plaintiff demanded judgment setting aside his conveyance to the defendant Patterson, and for general relief.

It does not appear that the plaintiff offered to reconvey the Tennessee land before the commencement of the action, nor does he offer in his complaint to do so, under the direction of the court. There is nothing to show that any request was ever made to have the acknowledgment of the deed or the defective certificate corrected by the grantors therein, nor is it averred that the grantors in that deed are asserting any adverse claim to the land, or that the plaintiff

was not in the complete and quiet possession and occupancy of it at the time the suit was commenced.

There are, therefore, at least two grounds upon which the ruling of the court in sustaining the demurrer to the complaint can be sustained: 1. It does not appear that there is any substantial defect in the plaintiff's title to the Tennessee land. Notwithstanding the defect in the certificate of the officer before whom the deed was acknowledged, the conveyance may have transferred a perfect title as between the parties to it. As a general rule a deed may be valid and binding on the parties who execute it, so as to pass the title to the grantee without any certificate of acknowledgment. *Fryer v. Rockefeller*, 63 N. Y. 268. Generally the necessity for an acknowledgment arises out of registry acts, which require certain formal proof of the execution of the deed before it can be recorded, in such a way as that the record shall furnish constructive notice of its contents, so as to affect subsequent purchasers. An acknowledgment is, therefore, not, as a general rule, essential to the validity of a deed as between the parties to it, but is only necessary in order to the effectual admission of the deed to record. *Hubble v. Wright*, 23 Ind. 322; *Mays v. Hedges*, 79 Ind. 288; *Behler v. Weyburn*, 59 Ind. 143; *Doe v. Naylor*, 2 Blackf. 32; 5 Am. and Eng. Cyclop. of Law, 443.

Ordinarily only subsequent purchasers for value can take advantage of the omission of words of identification, or other formal defects in the certificate of acknowledgment. *Mastin v. Halley*, 61 Mo. 196; *Chouteau v. Burlando*, 20 Mo. 482; 1 Am. and Eng. Cyclop. of Law. 154, 158.

At common law a married woman had no power to make a valid conveyance of her separate real estate. Her power in that respect is conferred and regulated by statute in the several States. Hence, where the certificate of acknowledgment is made an essential feature of the conveyance of the separate estate of a married woman, the form prescribed

Westhafer v. Patterson.

must be observed, or the deed will be invalid. *Jordan v. Corey*, 2 Ind. 385; *Woods v. Polhemus*, 8 Ind. 60.

It does not appear that the conveyance in question involved the separate estate of a married woman, and, if it did, we are not advised that the statutes of the State of Tennessee prescribe any particular form of certificate as essential to the validity of the conveyance between the parties to it. So far as appears, the statutes set out with the complaint relate entirely to the requisites of a certificate of acknowledgment as prescribed by the recording acts. Moreover, officers have the right, and it is a duty which they may be compelled at any time to perform, to correct mistakes in their certificates. *Jordan v. Corey*, *supra*; 1 Am. and Eng. Cylop. of Law, 149.

Assuming that the officer before whom the deed was acknowledged did his duty, and examined the wife separate and apart from her husband, it would follow that the informality in the certificate was the result of a mere clerical omission which might be corrected on proper application. *Fleming v. Potter*, 14 Ind. 486.

2. Even though the title was defective on account of the omission in the certificate, the conveyance was not void, and, as has been seen, it does not appear that the plaintiff offers, or has offered, to reconvey. It is familiar law that a party will not be permitted to rescind a contract so as to reclaim what he has parted with, and at the same time hold on to what he has received in the transaction. *Higham v. Harris*, 108 Ind. 246, and cases cited; *Patten v. Stewart*, 24 Ind. 332; *Home Ins. Co. v. Howard*, 111 Ind. 544; *Thompson v. Peck*, 115 Ind. 512. So long as the plaintiff manifests a disposition to hold on to the land conveyed to him, he can acquire no standing in a court of equity to rescind the contract. There was no error.

The judgment is, therefore, affirmed, with costs.

Filed Oct. 29, 1889.

Durham et al. v. Smith.

No. 14,220.

DURHAM ET AL. v. SMITH.

WILL.—Capacity of Testatrix.—Instruction to Jury.—An instruction to the jury that a person of unsound mind, all mental defects being included in the word “unsound,” is incapable of making a valid will, whether or not such unsoundness affected the disposition of the property, is erroneous.

SAME.—Witnesses.—Credibility of.—Instruction to Jury.—Where a jury is charged that witnesses residing near the testatrix, being more intimate with her, and having better opportunities of observation than those living farther away, other things being equal, are entitled to greater credit, the instruction is erroneous, as an invasion of the province of the jury.

INSTRUCTIONS.—Relating to Evidence.—When Erroneous.—It is only the duty of the court, in case of an instruction in regard to the evidence, to look into the record and determine whether there is any evidence to which the instruction is applicable, and if there is, and the instruction is erroneous, and such as is liable to mislead the jury, the judgment must be reversed.

From the Vigo Circuit Court.

R. W. Thompson, J. G. Williams, B. Harrison, W. H. H. Miller and J. B. Elam, for appellants.

S. C. Davis, S. B. Davis, J. G. McNutt, C. F. McNutt, G. E. Pugh and J. D. Pugh, for appellee.

OLDS, J.—This was an action to contest and set aside the will and probate thereof of Esther B. Thornton, deceased. The action was commenced by the appellee against the appellants, Milton L. Durham, executor of Milton L. Durham in his own right, the Rose Orphan Home, also against John D. Pugh, Horace C. Pugh and George E. Pugh. The interests of the three last named parties were with the plaintiff, and they do not appeal, and have served notice upon their co-defendants in accordance with the statute.

The testatrix, Esther B. Thornton, was an aged maiden lady, possessed of several thousand dollars' worth of prop-

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144	473
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166	469

Durham et al. v. Smith.

erty. The will was made on May 9th, 1884, and she died in January, 1885. The plaintiff was her niece, Milton L. Durham her nephew, the three Pughs were her grand-nephews, the children of her niece. The testatrix, by her will gave to her nephew and niece, and to her grand-nephews, each small legacies, and gave the balance of her estate, real and personal, to her nephew, Milton L. Durham for life, with remainder to the Rose Orphan Home.

There was a trial by jury, resulting in a verdict and judgment for the plaintiff, setting aside the will and probate thereof.

A motion for a new trial by appellants was overruled, and exceptions taken.

Several errors are assigned and discussed, but owing to the conclusion we have arrived at as to some of the questions presented it is unnecessary to consider the others.

We will first consider the question relating to instruction six given by the court, and which appellants contend is erroneous. The instruction is as follows:

"6. Furthermore, I instruct you that a person who is of unsound mind is incapable of making a valid will, and if there is unsoundness of mind, it is not necessary for the contestant to show that such unsoundness had anything to do with the manner of disposing of the property. In such a case the will is invalid, whether it is shown that the unsoundness of mind had, or had not, affected the character of the testament."

We do not think this instruction, unexplained or modified by some other instruction, states the law relating to the validity of wills correctly, and we think it would tend to mislead the jury.

It is contended on the part of the appellee that our statute defines who are of unsound mind as follows: "The words 'person of unsound mind,' as used in this act or any other statute of this State, shall be taken to mean any idiot, non-compos, lunatic, monomaniac, or distracted person," R.

Durham *et al.* v. Smith.

S. 1881, sec. 2544, and counsel say that "the words 'unsoundness of mind,' as used in the sixth instruction, are used in the sense of the statute, and not in their broad and common sense, including every species of defectiveness and impairment of mind or memory, but apply only to such cases as are absolutely unsound, as idiots, non-compos, lunatics, monomaniacs, and distracted persons," and that the "meaning of the two statutes, construed together, would be that all persons except minors, lunatics, idiots, non-compos, monomaniacs and distracted persons may devise."

We do not agree with the theory of counsel as to the scope of this instruction.

We think the words "unsoundness of mind" are used in this instruction in their broadest sense, including every species of defectiveness and impairment of the mind, and would be so construed by the jury, and the instruction, taken by itself, would not convey to the minds of the jury the true rule by which they should test the validity of the will. If the charge only included the words, "I instruct you that a person who is of unsound mind is incapable of making a valid will, and if there is unsoundness of mind it is not necessary for the contestant to show that such unsoundness had anything to do with the manner of disposing of the property," it would not be objectionable, as it would in that case state an abstract principle of law correctly. Unsoundness of mind having been proven, it would then be incumbent on the defendant to show that the unsoundness was of such a character as did not impair the mind to such an extent as to render the testatrix incapable of making a will, or that the defect in the mind in no way affected the disposition of the property, or entered into the making of the testament. What might be regarded as mental unsoundness may have been proven, and yet it may have been made to appear, from all the evidence in the case, that the mental unsoundness did not enter into the will. *Higgins v. Carlton*, 92 Am. Dec. 666 (28 Md.

Durham *et al.* v. Smith.

115); *Hovey v. Chase*, 83 Am. Dec. 514 (52 Me. 304); *Rogers v. Walker*, 47 Am. Dec. 470; *Clark v. Fisher*, 19 Am. Dec. 402.

By adding the words "in such a case the will is invalid whether it is shown that the unsoundness had or had not affected the character of the testament," it changed the scope and meaning of the instruction, and was, in effect, telling the jury that, upon considering all the evidence, if they came to the conclusion there was any unsoundness of mind, or defect of any character in the mind of the testatrix, no difference to what extent such defect affected or impaired the mind, or whether it in any way affected the disposition of the property devised or the making of the will, the will would be invalid; and this, too, even though the evidence might affirmatively establish the fact that such defect in no way entered into the making of the will or disposition of the property, and that she had at the time sufficient mental capacity to make a valid will. In short, this charge recognizes but two conditions of the human mind, one sound and capable of doing all acts, and the other unsound and incapable of doing any act; that a person is responsible for all his acts, or not responsible for any of his acts. This is an erroneous theory of the law. *Trumbull v. Gibbons*, 51 Am. Dec. 253; *Clark v. Fisher*, *supra*; *Jackson v. King*, 15 Am. Dec. 354, and note, 363.

In the case of *Lowder v. Lowder*, 58 Ind. 538, it was held that, "In legal contemplation, one who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to enable him to know and understand the extent of his estate, the persons who would naturally be supposed to be the objects of his bounty, and who could keep these in his mind long enough to, and could, form a rational judgment in relation to them, is a person of sound mind." It is evident that a person might be possessed of the requisite capacity to make a will, as held in *Lowder v. Lowder*, *supra*, and yet have some de-

Durham *et al.* v. Smith.

fect of the mind, some delusion in relation to some subject entirely foreign to the execution of the will, the disposition of the property, the devisees, or those who are the natural objects of his bounty.

It is not necessary that we point out in this opinion what particular defects, or delusions, there may be in a testator's mind, and yet he possess sufficient mental capacity to make a valid will; it is sufficient if there may be any to render the instruction under consideration erroneous, and it is manifest there are some. See *Addington v. Wilson*, 5 Ind. 137 (61 Am. Dec. 81, and note, 84); *Kenworthy v. Williams*, 5 Ind. 375, and authorities hereinbefore cited.

We think the instruction clearly erroneous, and ought not to have been given. It is contended that even if erroneous it was cured by other instructions given, which did correctly state the proper rules governing the mental capacity of the testatrix to make a valid will, but this we need not consider, for the reason that the judgment must be reversed on account of another erroneous instruction.

So much of the fifteenth instruction given by the court as it is necessary to consider is as follows:

"15. In weighing the testimony of witnesses the jury should consider the capacity of each witness to understand the facts about which he testifies; his opportunity of knowing the mental condition of the testatrix at the time the will was executed, his or her integrity, bias, behavior on the witness stand, and the entire deportment of the witness. The opinion of a witness whose attention has been particularly called to the testatrix, who was familiarly acquainted with her, who had frequent opportunities of observing her and the operations of her mind, is entitled to greater weight than that of a witness of equal sagacity, whose opportunity of forming an opinion was more limited. The facts upon which the opinions of the witnesses are based have been stated to you, and you should weigh the opinions thus expressed by the facts stated."

Durham et al. v. Smith.

Similar instructions to this have been repeatedly considered by this court, and held erroneous on the ground that the court invaded the province of the jury by directing them that the testimony of one class of witnesses was entitled to more weight than the testimony of others, and the cases relating thereto are collected in the case of *Cline v. Lindsey*, 110 Ind. 337. This instruction was clearly erroneous, but counsel contend that it was most favorable to the appellants, whose witnesses, or the greater number of them, resided nearer to the testatrix during her lifetime, and were more intimate with her than the witnesses of the appellee. It is not contended that all of the witnesses for the appellants resided nearer to and were more intimate with the testatrix than any of the witnesses for the appellee, and even if this was the fact, we doubt if the instruction could be sustained on the ground that no harm was done the appellants. It is only the duty of the court, in case of an instruction in regard to the evidence, to look into the record and determine whether there is any evidence to which the instruction relates or applies, and if there is, and the instruction is erroneous, and such as would be liable to mislead the jury, then the judgment must be reversed; and such is the fact in this case, and for this error the judgment must be reversed.

The cause having to be reversed for the giving of instruction number fifteen, it is unnecessary to consider the other questions presented, for they are not such as will be liable to arise on a retrial of the cause.

Judgment reversed, with costs.

Filed Oct. 29, 1889.

Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co. v. Cooper, Adm'r.

No. 13,500.

**THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO
RAILROAD COMPANY v. COOPER, ADMINISTRATOR.**

RAILROAD.—Negligence.—Leaving Injured Passenger on Track.—Carrier's Duty of Protection.—Where a passenger, by reason of the failure of the train employees to call the stations, attempts to alight at a station called by a fellow passenger, not his destination, and is thrown from the platform to the track by the sudden starting of the train, and afterwards, while upon the track between the station and his destination, in a partially unconscious condition from his fall, is negligently run down and killed by a passenger train in charge of employees having knowledge of his fall and condition of mind, the company is liable because of its duty, having knowledge of his fall and mental condition, to use care to protect him from its trains.

SAME.—Running Trains.—Company Chargeable with Knowledge of.—Liability.—In such a case the company is chargeable with knowledge of the running of trains upon its road, and to render the company liable it is sufficient that the accident, without being foreseen, was such as might naturally result.

SAME.—Injured Passenger.—Not a Trespasser.—Where a passenger injured by a fall from a train, and in a dazed state, is knowingly left by the carrier upon the track, he will not be regarded as a trespasser.

SAME.—Injured Passenger.—Carrier's Wrongful Act.—Proximate Cause of Death.—The wrongful act of the carrier in leaving its injured passenger on the track exposed to great and known peril, without mind enough to care for himself, was the proximate cause of his death.

SAME.—Injury to Passenger while Intoxicated.—Company's Fault.—Liability.—Where a passenger is injured while intoxicated, the injury being due, not to his intoxication, but to the carrier's wrongful act, the carrier will not be relieved of liability.

SAME.—Instruction to Jury.—Wilfulness.—What Necessary to Sustain Charge of.—An instruction to the jury that to establish the charge of wilfulness "an actual intent to do the particular injury alleged need not be shown," but that "misconduct of defendant's servants, such as to evince an utter disregard of consequences, so as to inflict the injury complained of, may of itself tend to establish wilfulness," is not erroneous.

SAME.—Instruction Relating to Intoxicated Passenger.—Failure to Repeat.—Where the jury is strongly instructed once that if the intestate's presence on the track and his injury were due to his intoxication, there

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Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co. v. Cooper, Adm'r.

could be no recovery, a failure to repeat the instruction is not just cause of complaint.

SAME.—Carrier's Negligence at Station.—Instruction Upon.—In the trial court's instruction there was no error in charging the jury that if the intestate's condition and injury were caused by the defendant's negligence at the station, the plaintiff was entitled to recover.

From the Bartholomew Circuit Court.

S. Stansifer, for appellant.

G. W. Cooper and *C. S. Baker*, for appellee.

ELLIOTT, C. J.—The material facts stated in the second paragraph of the appellee's complaint are these: On the 18th day of April, 1885, Uriah Holland, the appellee's intestate, entered a train of the appellants, which carried both passengers and freight, at the city of Columbus, and paid his passage to the town of Hope, a regular station on the line of appellant's road. When the train, on which the intestate was a passenger, reached the station of Lambert, a point between the city of Columbus and the town of Hope, the appellant's employees failed and neglected to announce the name of the station, but some one in the car called out "Hope," as if naming the station. After the train had stopped at Lambert, the intestate, believing it to be the station for which he had taken passage, endeavored to alight from the train in the usual manner, and the employees of the appellant, without giving any warning or notice, carelessly and negligently caused the train to be suddenly started, and the intestate, without any fault on his part, was thrown violently from the platform of the car, on which he was standing, to the track. The fall rendered him unconscious, and of this the appellant had knowledge, as well as of its cause. Soon after the occurrence, and while the intestate was upon the appellant's track in a dazed and partially unconscious condition, at a point seventy rods distant from Lambert, the appellant's employees in charge of a passenger train, and having knowledge of the fact of his fall from the train and his condition in time to have avoided injury to him by the

Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co. v. Cooper, Adm'r.

exercise of ordinary care, negligently and without giving any signal or warning of the approach of the train, or taking any precaution to avoid injuring him, caused the passenger train to run upon him, thus causing his death, without any fault or negligence on his part.

If the intestate had been on the track through no fault of the appellant and without knowledge on its part of his condition, no action could be maintained; but he was on the track through the fault of the appellant, and it did know of his condition. The rule applicable to cases where persons trespass on the company's track can not govern in such a case as this. Even if it should be conceded that there was no breach of duty on the part of the appellant in failing to announce the station, still there was negligence in starting the train with a sudden jerk. *Louisville, etc., R. R. Co. v. Crunk*, 119 Ind. 542; *Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S. 291; *Doss v. Missouri, etc., R. R. Co.*, 59 Mo. 27; *Andrist v. Union Pacific R. W. Co.*, 30 Fed. Rep. 345. But we might go further and concede that there was no negligence in starting the train, and still we should be required to hold that a cause of action is stated, inasmuch as the fact that the intestate was known to have been thrown to the track in an effort to alight from the train and rendered unconscious, made it the duty of the appellant to use care to prevent injury to him from its own trains. A railway carrier of passengers has no right, where care and diligence can prevent it, to leave a helpless passenger, who has fallen from one of its trains, in a situation of known danger. If a passenger, without fault on his part or that of the carrier, but as the result of a pure accident, should be thrown from a train upon the track and rendered helpless, it would be the duty of the railway carrier, if the facts were known to it, to use proper care and diligence to prevent injury from passing trains.

The appellant was bound to know that trains were running upon its own road, and it was under a duty to the passenger who was thrown upon its track to take steps to prevent in-

Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co. v. Cooper, Admr.

jury to him from the danger which it knew he was likely to incur from its trains. It does not matter that the injury which actually occurred was not foreseen, it is enough that it was such as might naturally result. *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166; *Dunlap v. Wagner*, 85 Ind. 529 (44 Am. Rep. 42); *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544 (566), and cases cited; *Hill v. Winsor*, 118 Mass. 251; *Lane v. Atlantic Works*, 111 Mass. 136. "It is not necessary," said the court in *Hill v. Winsor*, *supra*, "that injury in the precise form in which it in fact resulted should have been foreseen." It needs no argument to demonstrate the truth of the proposition that danger must be presumed from passing trains if one in a state of bewilderment is left upon the track. A long line of cases affirm that one who goes upon a track even with mental and physical faculties undiminished is in fault, because he enters a place of danger, and the one who wrongfully puts another in such a place does a wrong, and is precluded from averring that the injured person was where he had no right to be. Here the carrier knowingly left its passenger upon the track, knowing, also, that injury from a fall from its train had impaired his mental faculties, and it can not be held blameless and its passenger declared a trespasser.

The wrong of the carrier in leaving its injured passenger on the track exposed to great and known peril, without mind enough to care for himself, was the proximate cause of his death. The case is stronger, not weaker, in the fact that those in charge of the train which ran upon him were informed as to his misfortune and his injury; for the two acts of negligence combined in one efficient cause, and the effect which might naturally have been expected did, in fact, result. The concurring wrongs blended in one strong unity, producing a legal tort, for which the wrong-doer must make compensation. *Evansville, etc., R. R. Co. v. Crist*, 116 Ind. 446; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179.

If, as counsel tacitly assume, it were true that Holland's

Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co. v. Cooper, Adm'r.

misfortune was due solely to his own wrong in voluntarily becoming intoxicated, we should have a very different case. We should, if such were the case, hold the paragraph of the complaint in which appears the statement that he was intoxicated to be insufficient. This we should do, for the reason that we are satisfied that a carrier is not bound to protect a drunken man from the consequences which result from his own folly or wrong. *Welty v. Indianapolis, etc., R. R. Co.*, 105 Ind. 55; *McClelland v. Louisville, etc., R. W. Co.*, 94 Ind. 276; *Louisville, etc., R. R. Co. v. Sullivan*, 81 Ky. 624. But a drunken man is not an outcast, and the railway carrier can not negligently suffer harm to come to him while he is a passenger. It owes him some duty, which, at its peril, it must not omit. It is not to answer for his folly, but for its own breach of duty. *Atchison, etc., R. R. Co. v. Weber*, 33 Kan. 543 (52 Am. Rep. 543); *Railway Co. v. Valleley*, 32 Ohio St. 345 (30 Am. Rep. 601). Here the drunken condition of the deceased was not the cause of his injury, for, as the complaint avers and the demurrer admits, the cause of his injury was the carrier's breach of duty, and for that breach of duty the carrier is answerable.

It is a just and beneficent principle, running through all the cases, that a railway company must do what humanity requires where it acts with knowledge of another's helpless condition. *Atchison, etc., R. R. Co. v. Weber, supra*; *Railway Co. v. Valleley, supra*; *Weymire v. Wolfe*, 52 Iowa, 533; *Northern Central R. W. Co. v. State*, 29 Md. 420; *Walker v. Great Western R. W. Co.*, L. R. 2 Exch. 228; *Swazey v. Union Mfg. Co.*, 42 Conn. 556; *Atlantic, etc., R. R. Co. v. Reisner*, 18 Kan. 458; *Marquette, etc., R. R. Co. v. Taft*, 28 Mich. 289 (opinion by COOLEY, J.); *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358 (49 Am. Rep. 752); *Louisville, etc., R. W. Co. v. Phillips*, 112 Ind. 59.

If, let it be supposed for illustration, a man should be seen bound to the track in time to avoid running upon him, it would certainly be an actionable wrong to run a train upon

Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co. v. Cooper, Adm'r.

him, and the case made by the complaint differs from the supposed one only in degree, for if the man on the track is so helpless from mental incapacity as not to be conscious of his acts, and this is known to the railway company, it is its duty to use reasonable care to prevent injury to him. In such a case the presumption that the man will leave the track can not apply, although it would apply if his condition were unknown to the employees of the company, or had not been caused by them. In this instance the man was a passenger, and his presence on the track, as well as his incapacity to avoid danger, was the result of the carrier's negligence. In no sense was he a mere trespasser, for by the wrong of the railroad company he was thrown upon the track, and there left in no condition to care for himself.

Among the instructions given by the court is this: "To establish the charge of wilfulness, as set out in the fourth paragraph of the complaint, I instruct you that an actual intent to do the particular injury alleged need not be shown; but if you find from all the evidence that the misconduct of the defendant's servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may of itself tend to establish wilfulness."

In our judgment this instruction expresses correctly an abstract rule of law. Recklessness, reaching in degree to an utter disregard of consequences, may supply the place of a specific intent. *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250; *Brannen v. Kokomo, etc., G. R. Co.*, 115 Ind. 115; *Indiana, etc., R. W. Co. v. Wheeler*, 115 Ind. 253.

The appellant's theory that the occurrence at Lambert's Station must be excluded from consideration is embodied in several instructions asked but refused. In refusing these instructions there was no error. The occurrence at that place, as is evident from what has been said, exerted an important influence upon the case even if appellant's general theory were correct; for, from it there was reason for inferring that the wrong which brought the intestate upon the track and

Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co. v. Cooper, Adm'r.

into danger was that of the appellant, and it also supplies ground for the inference that the appellant's employees in charge of the passenger train which killed Holland knew his condition, knew what caused it, and knew that he was exposed to danger. It warranted, at least, the inference that he was not a mere trespasser. But more than this, that occurrence may well be regarded as the cause of the unfortunate consequences which culminated in Holland's death. It is not, of course, proper to affirm in the instructions as matter of law that it should be so regarded, but it was proper that as matter of fact it should receive consideration by the jury. On the other hand, it would have been error to assert, as matter of law, that what occurred at Lambert was not the proximate cause of the injury. If, as the jury might well have inferred, the negligent conduct at Lambert was the cause of Holland's death, then the conduct of those in charge of the train which killed him can not be assigned controlling force. If the intestate's death was the probable result of the wrong at Lambert the right of action was complete, and the defendant liable for the legal consequences of that wrong. If death was the result, then, for causing death, the appellant is responsible.

As strongly as it could well be done the court directed the jury that if Holland's presence on the track, and his injury, were owing to his drunken condition there could be no recovery, and the fact that this direction was not repeated does not give appellant just reason to complain.

It is a general rule that instructions need not be repeated, and this rule disposes of many of the questions argued by counsel. *Union M. L. Ins. Co. v. Buchanan*, 100 Ind. 63.

We do not hold, nor mean to hold, that if the appellant had been free from fault at Lambert, the notice of Holland's condition would have required it to run its trains so slowly as to avoid the possibility of injuring him. On the contrary, we hold that the wrong which produced his mental incapacity, and caused him to wander along the tracks in

Bush v. The City of Indianapolis.

a dazed condition, is the one which constitutes the chief element of the right of recovery. The instructions of the trial court do not place the right of recovery upon the acts of those in charge of the train which ran over Holland, but they do clearly assert that if his condition was caused by the negligence of the defendant at Lambert, and that his presence at the place of danger was the result of that condition, the appellee is entitled to recover. If there is any criticism at all to be made upon the instructions, it is that they are too favorable to the appellant, for they place too much stress upon the conduct of the persons in charge of the train which killed Holland.

We have considered all the questions argued by counsel, but we do not deem it necessary to discuss them in detail, for the questions we have discussed are those which arise in the case and control its decision.

Judgment affirmed.

Filed Oct. 30, 1889.

190	476
120	486
120	476
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158	24

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169	193

No. 15,150.

BUSH v. THE CITY OF INDIANAPOLIS.

CONSTITUTIONAL LAW.—*License for Sale of Intoxicating Liquors.*—*Act of 1889.*—*Validity of.*—The act of March 11, 1889, Acts of 1889, p. 395, empowering cities and incorporated towns to increase the sum theretofore required to be paid for a license to sell intoxicating liquors is not invalid as violating section 21, article 4, of the State Constitution.

SAME.—*Amendment of a Statute.*—*Amendatory Act.*—*What Must be Set Out.*—It is well settled in this State that under section 21, article 4, of the Constitution a valid amendment of a statute may be made by setting out the section as amended, and that it is not necessary to set out the section to be amended.

Bush v. The City of Indianapolis.

SAME.—*Title and Body of the Act Must be Considered Together.*—Under our Constitution it requires both the title and the body of the act to constitute a valid law. In a consideration of the question as to whether the Legislature has observed the forms prescribed by the Constitution in the enactment of a law, they must be considered together.

SAME.—*Amendatory Act.—Title of Act.—When Sufficient.*—The title of the act in question sets out at full length the title of the act to be amended, reciting that it is the intention to amend a certain section of said act, and that said section is section 5317, R. S. 1881.

Held, that no valid objection can be urged to the title of the act.

SAME.—*Body of the Act.—How Construed.*—Where the body of the act, after such a statement in the title, refers to the section to be amended as section 5317, R. S. 1881, without any reference to the section of the original act, there can be no doubt that it was the legislative intent to amend said section, and the amendment is properly made.

SAME.—*Title of the Act Amended.—When Unnecessary to Refer to in the Body of the Act.*—Considering the title and the body of the act together, if it distinctly and unequivocally appears what particular section of a statute is to be amended, it is not necessary to refer, in the body of the amended act, to the title of the act thus amended.

SAME.—*Amendments of Statutes.—Constitutional Provisions Governing Same.*—The clause of the Constitution which forbids the amendment of a statute by a mere reference to its title is prohibitory, while the clause which requires that the section as amended shall be published and set forth at full length is mandatory.

SAME.—*Unconstitutional Statutes.—Power of Courts to Declare.—Doubts, How Resolved.*—The power of the courts to declare a statute unconstitutional is a high one, and is never exercised in doubtful cases. To doubt, is to resolve in favor of the constitutionality of the law. We are unable to say that there is no doubt as to the unconstitutionality of the amendatory act under consideration.

From the Marion Circuit Court.

S. Claypool, W. A. Ketcham, J. S. Duncan and C. W. Smith,
for appellant.

W. L. Taylor and H. E. Smith, for appellee.

COFFEY, J.—The Legislature of the State of Indiana, at its last session, passed the following act, viz.:

“An act to amend section six (6) of an act entitled ‘An act to regulate and license the sale of spirituous, vinous and malt and other intoxicating liquors; to limit the fee to be charged by cities and towns; prescribing penalties for intox-

Bush v. The City of Indianapolis.

ication, and providing for the recovery of damages for injuries growing out of unlawful sales of intoxicating liquors; to repeal all former laws regulating the sale of intoxicating liquors, and all laws and parts of laws coming in conflict with the provisions of this act; prescribing penalties for the violation thereof, and declaring an emergency,' being section 5317 of the Revised Statutes of 1881.

"Section 1. *Be it enacted by the General Assembly of the State of Indiana*, That section 5317 of the Revised Statutes of 1881 be amended so as to read as follows: No city or incorporated town shall charge any person who may obtain a license under the provisions of this act, more than the following sums for license to sell within their corporate limits: Cities may charge two hundred and fifty dollars, and incorporated towns one hundred and fifty dollars in addition to the sum provided for hereinbefore." Acts of 1889, p. 395.

Acting under the permission granted by this act the city of Indianapolis, on the 19th day of June, 1889, passed an ordinance requiring persons desiring to sell intoxicating liquors in the corporate limits of said city to pay a license fee of two hundred and fifty dollars to said city in order to procure a license for that purpose. The appellant having procured a license from the board of commissioners of Marion county, authorizing him to retail intoxicating liquors within the corporate limits of the city of Indianapolis, acting upon the assumption that the act above set out was unconstitutional, and that section six of the act sought to be amended was still in force, tendered to the proper officer one hundred dollars, the amount required under former city ordinances to procure a city license, and demanded a license to retail intoxicating liquors in said city. Such license being refused he proceeded to retail intoxicating liquors without a city license.

This suit was instituted by the appellee against the appellant to recover the penalty imposed by the ordinance of June

Bush v. The City of Indianapolis.

19, 1889, for selling intoxicating liquors within the corporate limits of said city without a city license so to do.

It is earnestly contended by the learned counsel for the appellant that if it was the intention of the Legislature, by the act in question, to amend section six of the act of March 17, 1875, Sp. Acts of 1875, p. 56, it so far departed from the requirements of section twenty-one, article four, of the Constitution of the State, that such intention was utterly futile; while, on the other hand, it is contended by the appellee that in the passage of said act the Legislature did comply strictly with the requirements of said section twenty-one, article four, of the Constitution.

It is now so well established that it requires no argument, or even citation of authorities, that there are three classes of laws which are unconstitutional, viz.:

First. Acts passed by a legislative body relating to matters over which it has no power to legislate.

Second. Acts passed by a legislative body where it neglects to observe the forms required by the Constitution necessary to give such acts validity as laws; and,

Third. Acts passed by legislative bodies which are inhibited by some constitutional provision.

It is not claimed by the appellant that this act falls within either the first or third class, but it is contended that it does fall within the second class.

Section twenty-one, article four, of our State Constitution is as follows: "No act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length." R. S. 1881, p. 20.

This provision is found in the constitutions of Nevada, Oregon, Texas, and Virginia, and provisions of similar import are to be found in the constitutions of Kansas, Ohio, Michigan, Louisiana, Wisconsin, Missouri, and Maryland.

It was formerly held by this court that in order to constitute a valid amendment to a statute, under this constitu-

Bush v. The City of Indianapolis.

tional provision, it was necessary not only to set out the section as amended, but also the section to be amended, *Langdon v. Applegate*, 5 Ind. 327; *Rogers v. State*, 6 Ind. 31.

But in the case of *Greencastle, etc., Turnpike Co. v. State, ex rel.*, 28 Ind. 382, these decisions were overruled, and it is now well settled that it is not necessary to set out the section to be amended, and that the constitutional requirement is fulfilled by setting out the section as amended.

In the case of *Feibleman v. State, ex rel.*, 98 Ind. 516, it was held that the section of the Constitution now under consideration required that an act amending a former statute should refer to the title of the act sought to be amended. It must be obvious to every one, however, that this section of the Constitution, as well as all other constitutional provisions, is to be construed in the light of the evil sought to be remedied or avoided.

The Constitution of the State of Michigan contains the following provision: "No law shall be revised, altered or amended by reference to its title only; but the act revised, and the section or sections of the act altered or amended, shall be re-enacted and published at length." Const. Mich., article 4, section 25.

In the case of *People, ex rel., v. Mahaney*, 13 Mich. 481, where the construction of this constitutional provision was involved, Judge COOLEY said: "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose.

Bush v. The City of Indianapolis.

Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation."

In the case of *Mok v. Detroit Building, etc., Ass'n*, 30 Mich. 511, where this provision of the Constitution was again called in question, the same learned judge says: "Alterations made in the statutes by mere reference, and amendments by the striking out or insertion of words, without reproducing the statute in its amended form, were well calculated to deceive and mislead, not only the Legislature as to the effect of the law proposed, but also the people as to the law they were to obey, and were perhaps sometimes presented in this obscure form from a doubt on the part of those desiring or proposing them of their being accepted if the exact change to be made were clearly understood. Harmony and consistency in the statute law, and such a clear and consecutive expression of the legislative will on any given subject as was desirable, it had been found impracticable to secure without some provision of this nature."

These opinions, we think, clearly and concisely state the object sought to be attained by the framers of our Constitution in the section now under consideration.

In the light of this object we proceed to the examination of the question involved in this case, and in doing so it is not improper to remark that under our Constitution it takes both the title and the body of the act to constitute a valid law. It is true that the Constitution distinguishes between the two, but in a consideration of the question as to whether the Legislature has observed the forms prescribed by the Constitution in the enactment of a law they must be considered together. So considered, does the act now before us fall within the evil sought to be avoided by the framers of the Constitution? It will be observed that the title of the act sets out at full length the title of the act sought to be amended, recites that it is the intention to amend section six (6) of said act and that section six (6) of said act is section

Bush v. The City of Indianapolis.

5317, R. S. 1881. A comparison of section six of the acts of 1875, with section 5317, R. S. 1881, will disclose the fact that they are one and the same thing. There is, therefore, no valid objection to the title of the act under consideration. Indeed, it is admitted, in argument, that the title is a sufficient compliance with the constitutional requirement.

It is conceded also, as we understand it, that if the body of the act read: "Be it enacted, etc., that section six of the above entitled act be amended to read as follows:" followed by the section of the act as amended, this would be a compliance with the last clause of the section of the Constitution above set out. But we are unable to see how this would make the legislative intent any more certain than it now appears. In the title of the act, section 6 of the act of 1875, and section 5317, R. S. 1881, are treated as one and the same thing, and the language in the body of the act is, "Be it enacted, etc., that section 5317, R. S. 1881, be amended so as to read as follows:" followed by the section as amended. There is, indeed, no doubt as to the legislative intent. The intent to amend section 6 of the act of 1875, is as certain, in our opinion, as if the act read, "Be it enacted, etc., that section 6 of the above entitled act be amended to read as follows," etc.

Considering the title and the body of the act together, if it distinctly and unequivocally appear what particular section of a statute is intended to be amended, we do not think it necessary to refer, in the body of the amended act, to the title of the act thus amended. The first clause of the section of the Constitution we are now considering is prohibitory in its terms, and prohibits the amendment of a statute by a mere reference to its title, while the second clause is mandatory, and requires that the section as amended shall be set forth and published at full length.

It is not contended that the amendment in question is made by mere reference to the title of the act intended to be amended, nor can it be successfully maintained that the sec-

 Moore v. The City of Indianapolis.

tion as amended is not set forth and published at full length. The Constitution itself furnishes the rule by which the legality of an amendment to a statute is to be tested, and by such rule the courts must decide the question, when it arises, in each particular case. We do not think that the act we are now considering falls within the mischief intended to be avoided by section 21, article 4, of the Constitution. If not a literal it is a substantial compliance with the terms of that constitutional requirement.

The power of the courts to declare a statute unconstitutional is a high one, and is never exercised in doubtful cases. To doubt is to resolve in favor of the constitutionality of the law; and we are unable to say that there is no doubt as to the unconstitutionality of the amendatory act under consideration.

The other questions in the case, discussed by counsel in their able briefs were fully considered and decided in the exhaustive and carefully prepared opinion in the case of *Moore v. City of Indianapolis*, *post*, p. 483, and need not be again considered here.

Judgment affirmed.

Filed Oct. 30, 1889.

No. 15,151.

MOORE v. THE CITY OF INDIANAPOLIS.

INTOXICATING LIQUORS.—*Sale of.*—*Board of County Commissioners.*—*License to Sell in Cities.*—*Section 5319, R. S. 1881, Construed.*—*The Act of 1875, regulating the sale of intoxicating liquors, saving section 5317, as amended by the act of 1889, limiting the amount which cities may demand for*

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135	407
130	483
137	54
130	483
145	467
120	483
148	30
120	483
155	149
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169	193

 Moore v. The City of Indianapolis.

license to sell intoxicating liquors, relates exclusively to licenses issued by the board of county commissioners, and therefore section 5319, R. S. 1881, providing that "No license herein provided shall be granted for a greater or less period than one year," applies only to licenses granted by the county board, and not to licenses granted by cities.

SAME.—License.—Refusal to Apply for.—Illegal Sale.—Clerk's Fee.—Estoppel.—One who refuses to apply for a license under the ordinance passed in pursuance of section 5317, R. S. 1881, as amended by Act of 1889, will be estopped to complain, while continuing to sell liquors in violation of the ordinance, that a section of the ordinance by providing for a clerk's fee of one dollar, in addition to the license fee, has exceeded the authority of the council.

SAME.—License.—Revocation of.—Valuable Consideration.—Police Regulation.—It is abundantly settled that a license, or permit, issued in pursuance of a mere police regulation has none of the elements of a contract, and that it may be changed, or entirely revoked, even though based upon a valuable consideration. It only forms a part of the internal police system of the State.

SAME.—Police Powers.—Right to Exercise.—Abridgment of.—Public Welfare.—A law regulating or authorizing municipal corporations to regulate and impose restrictions upon the sale of intoxicating liquors is an exercise of the police power of the State, and neither the State nor the municipality can, by any sort of contract, license, or permit, abdicate, embarrass, or bargain away its right to exercise the power in such a manner as it may thereafter deem the public welfare requires.

SAME.—License not a Contract.—Vested Right.—Police Power.—Unexpired License.—Ordinance Increasing Fee for.—Validity of.—A permit by the State to sell intoxicating liquors is but an exercise of its police power, in which no one can acquire a vested right or contractual interest, and is revocable by the Legislature at any time; and an ordinance in pursuance of a legislative act, which increases the fees for an unexpired license is a valid ordinance.

SAME.—Ex Post Facto Law.—What Constitutes.—A law is retrospective, retroactive, or *ex post facto*, which makes acts committed prior to its enactment criminal, or, as applied to past transactions, which creates a new duty or impairs vested property rights acquired under existing laws; therefore, an ordinance declaring that all sales of intoxicating liquors thereafter made by persons failing to comply with its provisions shall be unlawful, is not an *ex post facto* law.

From the Marion Circuit Court.

J. S. Duncan, C. W. Smith, S. Claypool and W. A. Ketcham,
for appellant.

W. L. Taylor and H. E. Smith, for appellee.

Moore v. The City of Indianapolis.

MITCHELL, J.—Section 5317, R. S. 1881, being section six of an act to regulate the sale of intoxicating liquors, and limit the fee to be charged by cities, etc., which went into force March 17th, 1875, Sp. Acts of 1875, p. 56, limited the amount which cities might demand for a license to sell intoxicating liquors within their corporate limits to one hundred dollars per annum.

By an act approved March 11th, 1889, Acts of 1889, p. 395, the above section was amended so as to fix the limit at \$250. While the section first above mentioned was in force, the ordinances of the city of Indianapolis fixed the license fee to correspond therewith, and made it unlawful for any person to retail intoxicating liquors within the city limits without having first procured a license from the city clerk. On the 19th day of June, 1889, an ordinance was duly adopted raising the license fee to \$250, the limit fixed by the act of March 11th, 1889. This last ordinance, by an express provision to that effect, repealed all prior ordinances in conflict therewith, and prohibited, under penalties prescribed, any person from thereafter retailing intoxicating liquors within the city, or within a distance of two miles of the corporate limits, without having first obtained a license pursuant to the provisions of the ordinance. It was provided, in the first section of the ordinance, in substance, that every person who should thereafter procure a license to sell intoxicating liquors from the board of commissioners of Marion county, and should pay into the treasury of Marion county for the use and benefit of the city, the sum of \$250, should be entitled, on presenting to the city clerk the county treasurer's receipt for the amount paid, and a license from the board of commissioners, to receive a license to sell within the city, at the place designated in the license issued by the county board. The second section provided, in effect, that any person holding an unexpired license issued to him by the county board, and an unexpired city license issued under prior ordinances of the city, might obtain a license under the later ordinance for the unexpired

Moore v. The City of Indianapolis.

term by paying for the use of the city such proportionate part of \$250 as the unexpired term bore to the whole, and that the amount which had previously been paid for a license under the prior ordinance should be taken into account and adjusted so that the applicant would receive full credit therefor. The appellant, William Moore, was charged with having sold intoxicating liquor within the corporate limits of the city without first having obtained a license in pursuance of the provisions of the last above named ordinance after it had taken effect.

As a defence he relied on an unexpired license issued by the city clerk, and held by him at the time of the alleged sale, which he had received in pursuance of the provisions of the ordinance in force prior to that adopted in June, 1889. The court held the proposed defence insufficient, and the appeal from this ruling involves an inquiry into the validity of the act of March 11th, 1889, and the ordinance adopted by the city of Indianapolis in pursuance thereof.

It is contended that the act above mentioned is invalid and void for failing to conform to the requirement of the Constitution, in that it contains no reference, in the body thereof to the title of the act to which it purports to be an amendment. This branch of the case is fully considered in *Bush v. City of Indianapolis*, ante, p. 476. After careful consideration, the point was decided adversely to the appellant, and needs no further attention here.

The appellant insists, however, that even if the act above mentioned should be held valid, yet the ordinance passed in pursuance thereof is beyond the authority conferred on the city council, and hence void. The first objection to the ordinance is predicated on section 5319, R. S. 1881, in which it is declared that "No license herein provided shall be granted for a greater or less time than one year." Taking this section as a premise, it is argued, in effect, that said section two of the ordinance in question makes provision for issuing a license for a period less than a year to any person

Moore v. The City of Indianapolis.

to whom a county license had issued before the taking effect of the ordinance, and who held an unexpired city license, the conclusion follows that the ordinance is invalid. While there is some plausibility in the argument as presented, we can not give it our assent.

With the exception of section 5317, as amended by the act of March 11th, 1889, the act of 1875 relates exclusively to licenses issued by the several boards of county commissioners. The sole purpose of that section, and of the amendment thereto, is to place a limitation upon cities and towns in respect to the amount which they might thereafter demand as a license fee in addition to the sum paid for license from the county board. Thus it has been held again and again that the act of March 17th, 1875, conferred no authority upon cities or incorporated towns to regulate or license the sale of intoxicating liquors, and that cities derive their power to demand license fees from sections 3106 and 3154, R. S. 1881, which sections are found in the general statute regulating the incorporation and providing for the government of cities. *Walter v. Town of Columbia City*, 61 Ind. 24; *Cowley v. Town of Rushville*, 60 Ind. 327; *Lutz v. City of Crawfordsville*, 109 Ind. 466; *Wagner v. Town of Garrett*, 118 Ind. 114.

The Legislature has conferred the power to regulate the liquor traffic in cities upon the municipal authorities in the broadest terms, the only limitation being upon the amount of the license fee which may be demanded. Concerning all matters of detail in the manner of regulation cities are left untrammelled.

The power of municipal corporations to exact license fees is not confined to requiring payment from persons who have State or county licenses, but extends to all persons, whether licensed by the county board or not, who keep shops for the sale of intoxicating liquors within the prescribed limits. The power exists altogether independently of the act of 1875. *City of Frankfort v. Aughe*, 114 Ind. 77; *Lutz v.*

Moore v. The City of Indianapolis.

City of Crawfordsville, supra. Since, therefore, the authority of cities to regulate the sale of intoxicating liquors, and to exact license fees from persons engaged in the business of selling at retail, is not, except as already indicated, controlled by the act of 1875, it follows that section 5319, which is a part of that act, and which prohibits the granting of a license for a greater or less period than one year, has no application to cities. We have not overlooked the argument based upon the assumption that the Legislature must have intended to provide a uniform system for the issuing of licenses by counties and cities, and that it should be held, therefore, that because counties are prohibited from issuing licenses, except for a prescribed period, it must have been the intention of the Legislature to extend the same prohibition to cities. Since, however, the legislative intent to fix the period for city licenses is wholly unexpressed in any statute, the argument, so far as it is based on analogy and convenience, can only have force when addressed to a body to which the framing of ordinances is committed. It may not be amiss to say, in concluding upon this point, that the ordinance in question in its practical effects, after the methods therein provided are duly initiated, does not violate this presumed legislative intent. To the extent that it makes provision for obtaining a license for a period less than a year, it was obviously intended for the benefit of those who, like the appellant, held unexpired licenses when the ordinance took effect.

The second objection urged against the validity of the ordinance is, that it requires the applicant for a license to pay a sum in excess of that allowed by the statute. By the terms of the ordinance it is made the duty of the city clerk, after certain conditions are complied with by the applicant, to issue to him a license. Section 3 requires the clerk to keep a register of the names of all persons to whom licenses are issued, together with the date when issued, and the time when each license expires, also the number of the street and

Moore v. The City of Indianapolis.

location where the licensee proposes to conduct the business. For this service a fee of one dollar is provided, which is to be paid by the person receiving the license. In this way, it is said, the licensee is charged \$251 for a license, and thus it is said a sum in excess of the amount allowed by the statute is demanded. If the appellant had applied for a license in compliance with the other sections of the ordinance, and his application had been refused because of his failure to pay the fee provided for the city clerk, he might, with some plausibility, insist upon the question presented. But he will not be heard to set himself in the face of the whole ordinance and refuse to take out or apply for a license while continuing to sell in violation of its provisions, upon the pretext that the fee of one dollar provided for the city clerk is in excess of the authority of the common council. When a case arises in which the applicant for a city license has tendered the amount which it is conceded the statute authorizes the city to charge, and has been refused because of his failure to pay the clerk's fee, we will decide whether or not a fee may lawfully be demanded by the clerk. *Wagner v. Town of Garrett, supra.*

It is next contended that the municipal authorities had no power, under the statute in question, to enact an ordinance increasing the amount of the license fee, and make it applicable to unexpired licenses, thereby practically annulling permits theretofore issued by the city. While conceding that a license is not an absolute contract in which the licensee obtains a vested right, during the full period for which it was granted, to sell upon the same terms as when the license was issued, it is contended that it is, nevertheless, in some sense, a contract between the city and the licensee, under which the latter acquires an absolute right to sell liquors during the term, subject to municipal regulation, without being required to pay an enhanced price, simply for the purpose of increasing the city revenue. Moreover, it is contended that a license to retail intoxicating liquors is a thing

Moore v. The City of Indianapolis.

of value, in the nature of property, and that, even if the Legislature had the power to annul existing licenses, or authorize it to be done, good faith required that the money paid for the unearned portion be refunded. Finally, it is said the ordinance is invalid, as applied to cases like the present, within the principle which denies, in the absence of a clearly expressed intent to the contrary, the power to give a law or ordinance retrospective or retroactive operation. We do not deem it necessary to enter upon an elaborate discussion of the several propositions involved. It is sufficient to say that principles as firmly settled as anything can be, upon the highest judicial authority, sweep away every vestige of the foundation upon which the argument against the validity of the ordinance rests. When it is conceded, as it is, and must be, that a law regulating, or authorizing municipal corporations to regulate, and impose restrictions upon, the sale of intoxicating liquors, is an exercise of the police power of the State, then it follows inevitably that neither the State nor the municipality can, by any sort of contract, license, or permit, abdicate, embarrass or bargain away its right to exercise this power in such a manner as it may thereafter deem the public welfare requires. It is the peculiar province of the State, either by legislative enactment or through authority delegated to municipalities, to exert its police power for the protection of the lives, health and property of its citizens, as well as to maintain good order and preserve public morals. It is everywhere conceded that the traffic in intoxicating liquors affects all these subjects, and that it is hence a proper subject for police regulation.

It is essential, therefore, that the power to regulate should be a continuing one, ever present and available, to be exercised by the State as emergencies may require. Hence the rule that neither the State, nor any of its agencies to whom the power has been delegated, can divest itself of the right to impose such other or additional restrictions upon the sale

Moore v. The City of Indianapolis.

of intoxicating liquors, as the maintenance of good order or the preservation of the public morals may seem to require. Cooley Const. Lim. 5th ed., p. 343.

Those powers which are inherent in all governments, and the exertion of which, as emergencies may demand, is essential to the well-being of organized society, can not be abridged or weakened, or their vigor impaired by contract or bargain. *Boyd v. Alabama*, 94 U. S. 645.

If by authorizing a license or permit for one year, the State could deprive itself of the right to impose new restrictions upon the licensee during that period, a law authorizing licenses might bind successive Legislatures for three, five, or even ten years. If the legislative discretion could be fettered or bargained away for one year, it could upon the same principle be bargained away for an indefinite period.

It is, however, abundantly settled that a license or permit issued in pursuance of a mere police regulation has none of the elements of a contract, and that it may be changed, or entirely revoked, even though based upon a valuable consideration. Cooley Const. Lim. 5th ed., p. 343.

A license issued under the law regulating the sale of intoxicating liquors has neither the qualities of a contract nor of property, but merely forms a part of the internal police system of the State. *Metropolitan Board v. Barrie*, 34 N. Y. 657. No one can acquire a vested right in a mere statutory privilege so as to bind the State, or prevent a change of policy as the varying interests of society may require. Cooley Const. Lim. 5th ed., p. 473.

"Sovereigns may make contracts which, under our Constitution, will preclude them from impairing vested rights by subsequent legislation, but this result never follows the exercise of a purely police power." *McKinney v. Town of Salem*, 77 Ind. 213, and cases cited. "As the power to grant, withhold or annul licenses to sell liquor is an exercise of the police power, it follows that no limitation can be placed upon its exercise by any statutory provision." *State, ex rel., v.*

Moore v. The City of Indianapolis.

Bonnell, 119 Ind. 494; *Stone v. Mississippi*, 101 U. S. 814; *Beer Co. v. Massachusetts*, 97 U. S. 25. It is impossible that a mere license or privilege secured under the internal police system of the State, should be invested with the elements of a contract so as to be beyond legislative control. *Burnside v. Lincoln County Court*, 86 Ky. 423 (7 S. E. Rep. 276).

"The law is now settled," said the Supreme Court of Georgia, "that the Legislature has the power to revoke licenses granted to retail liquors. Such a license is in no sense a contract by the State, county, or city with the person taking out the license. It is simply a permit granted by the authorities to do business under the license; and the license may be revoked by the Legislature at any time." *Brown v. State* (Ga.), 7 S. E. Rep. 915; *Fell v. State*, 42 Md. 71; *Calder v. Kurby*, 5 Gray, 597; *Commonwealth v. Brennan*, 103 Mass. 70; *Martin v. State*, 23 Neb. 371; *Pleuler v. State*, 11 Neb. 547.

In the case last cited it was held that licenses granted under a former law, which had been repealed, were absolutely revoked upon the taking effect of the later law. Thus it follows that by enacting the ordinance of June 19th, 1889, and repealing the former ordinance, the appellant's license was revoked.

The enactment of a law placing restrictions upon the sale of intoxicating liquors, and requiring the payment of a specified sum of money, and that a license be obtained before the business of selling can lawfully be entered upon, is not to be regarded as a proposition on the part of the State to contract for privileges, or to sell indulgences, but rather as a public proclamation, announcing that the State regards the unrestricted sale of intoxicating liquors as prejudicial to the general welfare, and that in the exercise of its police power, the traffic has been placed under regulation and restraint. Those who engage in the traffic, after the enactment of such a law, must be regarded as having notice from the beginning,

Moore v. The City of Indianapolis.

that the power of regulation is a continuing one, and that the State reserves to itself the right to deal with the subject as the special exigencies of the moment may require. *Stone v. Mississippi, supra.*

They are bound to know that the license or permit has no force or vitality except as it derives it from the law under which it was issued, and that if the public good requires that the law be modified or repealed, no incidental inconvenience which they may suffer can stay the hand of the State. No one can acquire a vested right in the law. *Bryson v. McCreary*, 102 Ind. 1; *Edwards v. Johnson*, 105 Ind. 594.

Even if it were conceded that a permit to sell intoxicating liquors was possessed of some of the characteristics of property, or that it was a thing of value, in the eye of the law, it would still offer no impediment against the exertion of the police power of the State. "The acknowledged police power of the State extends often to the destruction of property." *License Cases*, 5 How. 504 (577); *Mugler v. Kansas*, 123 U. S. 623 (658).

Even though the enforcement of an ordinance may operate to destroy a business theretofore lawful, and to seriously impair the value of property acquired under the sanction of a special law or charter, these considerations do not render the ordinance invalid or prevent its enforcement, when the protection of the public health or the promotion of the general welfare requires it. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (667); *Beer Co. v. Massachusetts, supra.*

There is a broad distinction between the taking of property under the power of eminent domain for a public use, and the incidental injury or inconvenience which results to property or business on account of the exertion of the police power of the State, when its purpose is the promotion of the public welfare. In the former case, compensation must be made; in the latter, no such obligation arises. A wide distinction exists, too, between an ordinance enacted in the ex-

Moore v. The City of Indianapolis.

exercise of the police power of the State, for the protection and security of the citizens, and one which merely imposes license fees for purposes of revenue, without any relation to the internal police and government of the city or State. Laws which impose pecuniary burdens on the liquor traffic are not revenue measures, in the proper sense, and although revenue may arise therefrom as an incident, the imposition is designed as a restriction on the traffic, and has relation to the internal police system of the State. *Pleuler v. State, supra*; *Mayor v. Second Ave. R. R. Co.*, 32 N. Y. 261.

The contention that the ordinance is retrospective or retroactive is not sustained.

A law can only be said to be retrospective or retroactive, or *ex post facto*, when it makes acts which were committed antecedent to its enactment criminal, or when it is to be applied to past transactions so as to create a new duty or impair vested property rights acquired under existing laws. *Anderson Law Dict.*, p. 897.

The ordinance in question does neither. It is altogether prospective in its operation. It declares that all sales of intoxicating liquors thereafter made within the corporate limits by persons who fail to comply with its provision shall be unlawful. The appellant was prosecuted for a sale made after the ordinance in question took effect. He was bound to know at the time he made the sale that he was violating the ordinance. He took the chance of defeating the ordinance, and he can not now complain that it was either an *ex post facto* or retroactive law. *State v. Isabel*, 40 La. Ann. 340.

As we have already seen, he acquired no vested right under the previous ordinance which was taken away, nor was there any contract relation existing, the obligation of which was impaired. When the premise is once established that one can acquire no vested right or contractual interest in a police regulation, the conclusion follows that subsequent regulations on the same subject can not be retrospective in a technical sense. "The contracts which the Constitution

Joseph v. Kronenberger *et al.*

protects are those that relate to property rights, not governmental." *Stone v. Mississippi, supra.*

The judgment is affirmed, with costs.

Filed Oct. 30, 1889.

120	495
132	47

No. 13,815.

JOSEPH v. KRONENBERGER ET AL.

JUDGMENT.—*Action to Recover.*—*When Maintainable.*—*Promissory Note.*—An action to recover a judgment *in personam* can not be maintained on a note till its maturity.

FRAUDULENT CONVEYANCE.—*Promissory Note.*—*Subjection of Property to Payment of.*—*When Action May be Maintained.*—Where the holders of a promissory note seek to subject to its payment lands and other property of the maker alleged to have been fraudulently conveyed, the action can not be maintained until the note becomes due.

SAME.—*Garnishment Proceeding.*—*Conveyance of Property to Defraud Creditors.*—*Valuable Consideration.*—*Collusion Between Parties.*—Where a person colludes with a debtor to defraud creditors, taking a conveyance of property for that purpose, but giving a valuable consideration therefor, and there is no money placed in the grantee's hands or under his control belonging to the debtor, and nothing owing from him to the debtor, a garnishment proceeding against the grantee can not be maintained.

EVIDENCE.—*Weight of.*—*Supreme Court.*—*Entire Absence of Proof.*—The Supreme Court will not examine the evidence in the record to determine the weight of evidence; but will, on the other hand, do so to ascertain whether there is an entire absence of proof as to all or any of the facts necessary to be established to entitle the plaintiff to judgment.

From the Vanderburgh Circuit Court.

A. Gilchrist and *C. A. DeBruler*, for appellant.

J. M. Shackelford and *S. B. Vance*, for appellees.

BERKSHIRE, J.—The appellees Kronenberger and Barnett

Joseph v. Kronenberger et al.

were plaintiffs in the court below, the appellant and the appellees Fares and Fitzgerald were the defendants.

The original or first paragraph of the complaint was filed, and the action commenced, on the 26th day of February, 1885. On the 9th day of May following, a second paragraph of complaint was filed, and on the 26th day of October, 1886, a third paragraph was filed.

The first paragraph is not in the record, nor is it necessary that it should be, for it was upon the second and third paragraphs that issues were joined and the case tried.

The following is an abstract of the third paragraph of the complaint as we find it in the brief filed by counsel for the appellees Kronenberger and Barnett:

"1. That the defendants, Larkin Fitzgerald and John C. Fares, by their promissory notes, dated the 19th day of April, 1884, agreed to pay plaintiffs, twelve months therefrom, the sum of three hundred and forty dollars, with interest thereon at eight per cent. per annum from date until paid, with five per cent. attorney's fees; a copy thereof is filed with the first paragraph and is referred to and made part thereof. No part of said note has been paid.

"2. John C. Fares is only the surety of defendant Larkin Fitzgerald, in the said notes.

"3. That on the 1st day of July, 1884, the defendant Larkin Fitzgerald made a mortgage to defendant Fares, on sundry articles of personal property therein mentioned, consisting of mules, horses, farming implements and harness, and a crop of corn growing on two hundred and thirty-five acres of land in the county of Henderson and State of Kentucky, subject to a lien for rent, to secure said Fares in the payment of a note of even date therewith, for fifteen hundred dollars, due nine months after date, with interest at seven per cent.; and also to secure said Fares from any loss by reason of any further advancements that might be made, or any endorsements by said Fares for said Fitzgerald.

"4. The said mortgage was made and acknowledged in

Joseph v. Kronenberger et al.

Vanderburgh county, Indiana, but at its date, Fitzgerald resided in the county of Henderson, and State of Kentucky, and the whole of the property embraced in said mortgage was situated therein, and the mortgage was there duly recorded according to the law of that State.

"5. On the 9th day of December, 1884, the defendant, John C. Fares, made a mortgage of all the property owned by him to John Kistner and others, to secure sundry debts other than that of plaintiffs', which mortgage was duly acknowledged and recorded; the said debts exceeded in amount the value of said property, and the whole thereof has been exhausted in their payment. The said Fares is wholly insolvent and has no property out of which plaintiffs' said debt or any part thereof can be made.

"6. On the 10th day of December, 1884, the said John C. Fares, by deed of that date, conveyed to the defendant Simeon Jaseph, all of his property, being the same embraced in his said mortgage, above mentioned, in trust for the payment of his debts. The said trust was accepted by the said Jaseph on the 11th day of December, 1884, and said deed and acceptance were duly recorded.

"7. The defendant, Fitzgerald, owned no property but that embraced in the said mortgage, made by him to defendant Fares, and has not, since that date, owned any other property.

"8. The said mortgage was made, and was intended, to secure the said Fares in any liability he might have incurred, or might incur, as surety for said Fitzgerald, including the note of plaintiffs herein mentioned. And plaintiffs say they are entitled to be substituted to the rights of said Fares in said mortgage, and to have the same foreclosed for their benefit.

"9. After the execution and acceptance of said deed of trust from John C. Fares to the defendant Jaseph, and while suit was pending, in favor of the plaintiffs against said Fitz-

Joseph v. Kronenberger et al.

gerald, in the Henderson Circuit Court, in the State of Kentucky, for the foreclosure of said mortgage, and to subject said mortgage property to the payment of their said debt, the defendant, Joseph, took possession of said property and wrongfully removed it from the State of Kentucky, and now has the same in his possession in this county, or has wrongfully sold and converted the same to his own use. Said property was worth six thousand dollars.

"11. Plaintiffs pray judgment for their said debt, and that defendant Joseph be required to account for the value of said property, and that so much thereof as may be necessary be applied to pay the judgment herein."

It is not necessary to set out an abstract of the second paragraph, as it does not differ materially from the third.

On the 12th day of January, 1886, affidavits in attachment and garnishment were filed. Among other things it was alleged in the affidavit in attachment that "the defendant Larkin Fitzgerald had sold, conveyed, or otherwise disposed of his property subject to execution, with the fraudulent intent to cheat, hinder, and delay his creditors," and in the affidavit in garnishment, among other things, it is stated "that he (the affiant) has good reason to believe that Simeon Joseph is indebted to the defendant Larkin Fitzgerald, and has the control or agency of certain money of the said Larkin Fitzgerald which the sheriff can not attach by virtue of the writ issued herein."

The appellant answered the main action in two paragraphs : 1. The general denial. 2. That the appellant bought the note and mortgage which had been executed by Fitzgerald, and from him the whole of the property described in the mortgage, and paid him therefor one thousand dollars in addition to said note of fifteen hundred dollars, which was secured by said mortgage, and which was the full value of said property ; that before his said purchase he was assured by Fares and Fitzgerald that Fares had made no endorsements

Joseph v. Kronenberger et al.

for Fitzgerald, nor any advancements to him, and so had no interest in the mortgage.

The following is the answer to the affidavit in garnishment :

" For answer to the garnishment in this action, the defendant Simeon Jaseph denies that he is indebted to the defendant Larkin Fitzgerald in any sum whatever, or was so indebted at the date of the filing of the affidavit of garnishment in this case, or at any time since said date. And said Simeon Jaseph further says that he had not, at the time said affidavit of garnishment was filed, the control or agency of any money of said Larkin Fitzgerald."

The other defendants were defaulted. Issue having been joined in the main action, and also in the proceedings in garnishment as between the plaintiffs and the appellant, the cause was submitted to the court for trial, with a request made at the proper time for a special finding. Afterwards the court returned its special finding, and to the conclusions of law as stated therein the appellant excepted.

The appellant then filed a motion for a new trial, which the court overruled, and he excepted. He then moved the court to arrest the judgment, which was overruled, and an exception reserved, and thereupon the court rendered judgment *in personam* against the appellant for the amount found due upon the note sued upon.

The assignment of error contains four specifications :

1. The court erred in its conclusions of law.
2. The court erred in overruling the motion for a new trial.
3. The court erred in overruling the motion in arrest of judgment.
4. The court erred in rendering judgment against the appellant and for the appellees Kronenberger and Barnett.

The fourth specification is covered by the first and second. How far a motion in arrest of judgment reaches the record, and whether or not the affidavits in attachment and garnish-

Joseph v. Kronenberger *et al.*

ment will be considered by the court in aid of the complaint as against a motion in arrest of judgment, we do not feel called upon to determine at this time.

This leaves for our consideration the first and second specifications, which we may consider together.

This was an action upon a promissory note not due when the action was commenced. Until due no action to recover a judgment *in personam* could be maintained upon the note. The case of *De Haven v. Covalt*, 83 Ind. 344, cited by appellees' counsel, is not to the contrary of our conclusion. The learned commissioner delivering the opinion of the court in that case states expressly that the judgment complained of was erroneous; the error was held to be unavailable in the case he was considering, for the reason that the judgment could not be attacked collaterally, because it was not void. The following cases fully sustain our conclusion: *Collins v. Nelson*, 81 Ind. 75; *Evans v. Thornburg*, 77 Ind. 106. But had the note fallen due before suit, the appellant was not liable thereon. It is nowhere averred that he ever assumed or bound himself to pay the debt evidenced by the note.

If the appellant practiced a fraud, Kronenberger and Barnett could not maintain an action against him until their debt matured, for until then they could not know that the note would not be paid according to its terms, and, therefore, could not claim that they were damaged by the fraud perpetrated. See the two authorities cited above.

One of the reasons assigned for a new trial is, that the finding is not sustained by sufficient evidence.

The proviso to section 913, R. S. 1881, reads thus: "That the plaintiff shall be entitled to an attachment for the causes mentioned in the second, fourth, fifth, and sixth specifications of this section, whether his cause of action be due or not."

The ground alleged in the affidavit in attachment is covered by the fifth specification. Notwithstanding the length of the complaint and the many averments therein, when we come to consider it in connection with the proceedings in

Joseph v. Kronenberger et al.

attachment, we can only regard it as an ordinary action upon a note. And we must regard it in that connection, for, as we have seen, it discloses no cause of action independent of the attachment proceedings. It is a well settled rule of this court that it will not look into the evidence contained in the record with a view of determining the weight of evidence as between the parties; it is also a rule equally well settled that the court will look to the evidence for the purpose of ascertaining whether there is an entire absence of proof as to all or any of the facts necessary to be established to entitle the plaintiff to a judgment. If, at the time of the commencement of the proceedings in attachment, including the garnishment proceedings, the appellant had no money in his hands or under his control belonging to Fitzgerald, and was not indebted to him in any sum, it follows from what we have said that the appellees Kronenberger and Barnett were not entitled to a recovery against him. The evidence not only fails to show that the appellant had money in his hands or under his control belonging to Fitzgerald, but goes further and discloses affirmatively that such was not the case; and in this particular the special finding of facts as made by the court and the evidence agree.

The facts as found by the court are to the effect that Fitzgerald and the appellant conspired together and perpetrated a fraud, and that it was hurtful to the creditors, and there is evidence tending to support the finding; but the appellant did not thereby become indebted to Fitzgerald, nor was there any money placed in his hands or under his control belonging to Fitzgerald.

The transaction as disclosed was valid and binding between the parties, and independent of any rule of law which would intervene and prevent Fitzgerald from holding the appellant to an account, the facts disclosed show that he was under no moral obligation to pay to or turn over to Fitzgerald any money. As appears from the evidence, Fitzgerald sold the

The City of Huntington v. Hawley *et al.*

mortgaged property to the appellant, and he paid therefor all that he agreed.

Whether the circumstances as proven are such that in a proper action, brought at a proper time, equity would treat the appellant as a trustee for the benefit of the creditors of Fitzgerald, is a question not presented by the record in this case.

This is an action wherein the parties must stand upon their legal and not their equitable rights.

Judgment reversed, with costs, with instructions to grant a new trial.

Filed Oct. 19, 1889; petition for a rehearing overruled Dec. 14, 1889.

No. 13,656.

THE CITY OF HUNTINGTON v. HAWLEY ET AL.

PLEADING.—*Complaint.*—*Evidence.*—*Demurrer.*—*Harmless Error.*—Where the same evidence can be introduced, and the same relief granted, under the second as under the first paragraph of complaint, there is no available error in sustaining a demurrer to the first paragraph, if the demurrer to the second is overruled.

SUPREME COURT.—*Reversal of Judgment.*—*Weight of Evidence.*—Where there is evidence tending to support the finding of the court, the Supreme Court will not reverse a judgment on the weight of the evidence.

EVIDENCE.—*Town Plat.*—*Exclusion of.*—*Harmless Error.*—When the record of an alleged plat of a town, without date, acknowledgment, or date of recording, is refused admission in evidence, but another plat, conceded to be identical with the one excluded, is admitted, there is no error in excluding it.

From the Huntington Circuit Court.

The City of Huntington v. Hawley *et al.*

B. F. Ibach, J. G. Ibach and L. P. Milligan, for appellant.

J. B. Kenner and J. I. Dille, for appellees.

OLDS, J.—This is an action by the appellant against the appellees to enjoin the appellees from interfering with or desecrating certain real estate described in the complaint, alleged to have been dedicated to and accepted by the city as a cemetery, and within the city limits of the city of Huntington.

The first error assigned is sustaining a demurrer to the first paragraph of the complaint. The second paragraph of the complaint is substantially the same as the first. The same evidence could be introduced and the same relief granted under the second as under the first, and the demurrer was overruled to the second, issues joined and trial had upon it, and there is no available error in sustaining the demurrer to the first paragraph.

The only other error assigned is the overruling of the appellant's motion for a new trial. The first question presented on the overruling of the motion for a new trial is as to the sufficiency of the evidence to support the finding and judgment of the court. There is evidence tending to support the finding of the court, and this court will not reverse a judgment on the weight of the evidence.

The next question presented is the ruling of the court in refusing to admit in evidence the record of a plat purporting to be a plat of the town of Huntington. The plat does not bear any date; it is not acknowledged, nor does the date of its recording appear, and another plat conceded to be identical with the one excluded is admitted in evidence. There was no error in excluding it.

It is next contended that the court erred in admitting in evidence a deed from Sarah M. Tipton *et al.*, being all the heirs of John Tipton, senior, and John Tipton, junior, former owners of the land, to the appellees for the land in

Jackson *et al.* v. Myers.

controversy. There was no error in the admission of this deed in evidence.

There is no error in the record for which the judgment should be reversed.

The judgment is affirmed, with costs.

Filed Oct. 31, 1889.

No. 13,926.

JACKSON ET AL. v. MYERS.

CONTRACT.—*Specific Performance.*—*Real Estate.*—*Conveyance of Wife's Interest in.*—*Statute of Frauds.*—*Debtor and Creditor.*—An agreement not in writing, but which it is averred was to be reduced to writing, entered into between a creditor and the wife of his debtor, whereby the creditor agreed, in consideration of the conveyance to him by the debtor, his wife joining, of certain real estate, to convey to the debtor's wife, upon the fulfilment of certain conditions, an undivided one-third interest in said real estate, falls within clause 4, section 4904, R. S. 1881, and is incapable of specific performance, being a parol contract for the sale of lands, under the statute of frauds.

SAME.—*Execution of Deed.*—*Failure to Demand.*—*Fraud.*—Conceding that the creditor was morally bound to execute the conveyance to his debtor's wife, without a demand therefor, no demand being alleged, the failure to do so would not constitute a fraud. To hold so would be to abolish all distinction between fraud and breach of contract.

SAME.—*Demand and Refusal.*—*Statute of Frauds.*—*Presumption of Fraud.*—If a demand had been made for the execution of the agreement and a refusal, and afterwards a demand for a deed, and a refusal, no presumption of fraud would have arisen such as would have taken the case out of the operation of the statute of frauds; at most, this would have shown an unwillingness to comply with the contract.

PLEADING.—*Fraud, how Pleaded.*—*Presumption of Fraud.*—*How Created.*—Fraud can not be pleaded in general terms, but the facts or circumstances

120	504
124	50
130	504
135	186
136	96
120	504
145	203
146	632
120	504
151	186

Jackson *et al.* v. Myers.

constituting the fraud must be averred. The presumption of fraud arises from facts or circumstances which tend to show bad faith, and which operate prejudicially on the rights of others.

APPEAL.—Partition Proceeding.—When Appeal May be Taken.—Interlocutory Judgment.—Where the action is one primarily for partition, an appeal will not lie from the interlocutory order of the court appointing commissioners to make partition between the parties, but where the orders for partition and appointment of commissioners are mere incidents to the judgment and decree of the court, and the principal questions involved are the title to real estate, the right to the possession thereof, and the recovery of damages, the judgment of the court as to these questions is a finality, and the right of appeal exists.

From the Orange Circuit Court.

N. Crooke, M. F. Dunn and G. G. Dunn, for appellants.

G. W. Friedley, J. R. East, W. H. East, J. Giles, W. O. Farrell and S. O. Pickens, for appellee.

BERKSHIRE, J.—The appellee, who was the plaintiff below, filed her complaint in two paragraphs, to each of which separate demurrers were filed by the appellants, and the same being overruled by the court proper exceptions were taken. The case was thereafter put at issue by the filing of answers and replies, after which there was a jury trial, a special verdict returned and a judgment thereon for the appellee.

There are several errors assigned, but in view of the conclusion which we have reached as to the second and third errors it does not become necessary to notice the others.

The second error brings before us the action of the court in overruling the demurrer to the first paragraph of the complaint, and the third error the action of the court in overruling the demurrer to the second paragraph of the complaint.

The first paragraph alleges that the appellee is the legal owner of an undivided one-third of the real estate described therein, a wrongful withholding of the possession from her by the appellants, and demands judgment for possession.

The paragraph alleges a tenancy in common as between

Jackson et al. v. Myers.

the appellee and the appellants, and we are inclined to the opinion that it is sufficient to withstand a demurrer, but do not decide the question for the reason that the judgment, (as appears from the record) obtained by the appellee rests entirely upon the second paragraph of the complaint.

The second paragraph is clearly bad, and the court below erred in overruling the demurrer thereto.

The following is a copy of the paragraph, omitting the formal parts: "The plaintiff says that she is the wife of Peter Myers, and has been such for twenty years last past; that on the 30th day of September, 1870, the said Peter Myers was indebted to one John Holland in the sum of \$2,341.50, and that on said day he executed a mortgage, the plaintiff joining, to secure said indebtedness upon the lands hereinafter described; that afterwards, to wit: on the 3d day of May, 1872, being the owner thereof, Peter Myers executed a warranty deed to said John Holland, with this plaintiff joining, conveying to said John Holland the following described real estate in said county of Lawrence and State of Indiana, to wit: the southwest quarter of section 25, town 5 north, of range 1 east; also, the northwest quarter of section 36, and the west half of the northeast quarter of section 36, town 5 north, of range 1 east; that the consideration for said conveyance was the said sum of \$2,341.50, and the further sum of \$500 due the said Holland from the said Peter Myers; that the lands were of great value, to wit: the sum of \$10,000; that it was also agreed that said deed should be in effect and operation a mortgage to secure said indebtedness, and that as soon as such indebtedness was paid off and satisfied then the said John Holland was to redeed to this plaintiff the undivided one-third of said lands; and it was further agreed that the said Holland would, as soon as convenient thereafter, reduce said agreement to writing, and that said plaintiff and Peter Myers should retain possession of said lands until such re-conveyance was so made; but plaintiff avers that said John Holland fraudulently refused

Jackson et al. v. Myers.

to reconvey, notwithstanding the fact that the said Peter Myers on the 4th day of September, 1874, fully paid off to said Holland all of such indebtedness, and took up such mortgage by executing to said John Holland a quitclaim deed to said real estate, in which this plaintiff did not join; plaintiff further avers that on the ——— day of ———, 1874, said John Holland died, leaving the defendants as his heirs-at-law; that on the 4th day of April, 1876, in a suit for partition, in which this plaintiff was not a party, but in which the heirs of John Holland were parties, by the judgment of the Lawrence Circuit Court the defendant, Berrillah Jackson, was, as between said heirs, declared the owner of said lands herein described, and she on said day received a commissioners' deed for the same, with full knowledge of the agreement of said John Holland and this plaintiff, and without paying any valuable consideration for the same; plaintiff further avers that all of said defendants are claiming an interest in said real estate adverse to this plaintiff, and have cast a cloud upon her title to the same; she further avers that said defendants have committed waste by cutting and removing valuable timber from the same to the value of \$2,000; that they have received the rents and profits of said real estate for eleven years last past, which were reasonably worth \$500 per annum; she further avers that said lands are not susceptible of division without injury to the whole."

The facts alleged, which are admitted by the demurrer to be true, created the relation of mortgagor and mortgagee as between the parties. Whether Holland held the legal title subject to redemption by the payment of the indebtedness, or was but a mere encumbrancer, is not material to the conclusion to which we have arrived.

At the time the conveyance was executed and the agreement made between Holland and the appellee, she held no present interest in or title to the real estate, but was possessed merely of a contingent estate, which, in case she survived her

Jackson et al. v. Myers.

husband, would ripen into a fee simple title to one-third of the real estate, or into a life-estate, as the law might determine.

The contract with Holland was not for the protection of her contingent estate, but was for a new estate—a definite and substantial interest in the land, and which was in no way connected with, or dependent upon, her contingent estate. The conveyance of her contingent estate was the consideration for the new estate which Holland agreed to convey to her.

If, after the conveyance to Holland, Peter Myers still held the legal title to the land, as he would have done if the instrument had been a mortgage in the ordinary form, then the appellee held her contingent estate intact except as encumbered by the said conveyance; and under the arrangement, immediately upon the execution of the quitclaim deed by her husband, the appellee should have received a deed conveying to her one-third of the real estate in fee simple, and in case she survives her husband will be entitled to an additional one-third of the whole in fee simple, or for life, as the case may be.

That the contract in question falls within the statute, clause 4, section 4904, R. S. 1881, there can be no question, and there are no facts or circumstances averred to carry it without the statute.

It is claimed that as Holland agreed to reduce the agreement to writing at some convenient time in the future, and fraudulently refused to execute a deed after the payment of the indebtedness, the case is not within the statute. But it will be observed that there is no averment that Holland refused to reduce the agreement to writing, and so far as we are informed by the pleading, we can not say that he did not; and although it is averred that he refused to execute a conveyance, it is not averred that he was ever asked to do so.

As the time agreed upon for the execution of the agreement was uncertain, a demand was necessary to its enforce-

Jackson *et al.* v. Myers.

ment ; but as the conveyance was to be executed as soon as the indebtedness was paid, the appellee, if otherwise entitled to a conveyance, was not required to make a demand therefor. It is alleged in general terms that Holland fraudulently refused to execute a conveyance.

Conceding that he was morally bound to execute a conveyance without a demand therefor, his failure so to do would not constitute a fraud. To so hold would be to abolish all distinction between fraud and breach of contract.

In *Buchanan v. State, ex rel.*, 106 Ind. 251, it is held that an action may be maintained in some cases without a demand, and yet it will require a demand to constitute the presumption of fraud. But had there been a demand made for the execution of the agreement, and a refusal, and afterwards a demand for a deed, and a refusal, no presumption of fraud would have arisen ; at most, this would have shown an unwillingness to comply with the contract.

The presumption of fraud arises from facts or circumstances which tend to show bad faith, and which operate prejudicially on the rights of others.

This court has often held that it is not good pleading to charge fraud in general terms, but that the facts or circumstances constituting the fraud must be averred.

The question now under consideration was not involved in the case of *Teague v. Fowler*, 56 Ind. 569. The facts of that case were as follows : A. was a defaulting administrator, and the owner of two eighty-acre tracts of land. B. was one of his sureties, and, with the understanding and agreement that B. would pay certain of the debts owing by A. and convey to his wife the eighty-acre tract on which they resided, A. and his wife conveyed to B. the two eighty-acre tracts, and B. having refused to convey to the wife of A., an action was brought to compel a conveyance, and B. was compelled to perform his contract and execute the conveyance.

Under the facts of that case B. held the title as a trustee without an interest, and was the mere vehicle whereby the

Jackson *et al.* v. Myers.

title was to be conveyed from A. to his wife. B. had no power to dispose of or to manage the real estate, his power being limited to the mere conveyance of the legal title to its rightful owner.

It is well settled that trusts are not within the statute. Besides, section 2981, R. S. 1881, covered and should have ruled that case, and anything stated by the learned judge who wrote the opinion, touching any question not before the court, must be regarded as *obiter dicta*. *Butcher v. Stultz*, 60 Ind. 170, and *Caress v. Foster*, 62 Ind. 145, simply reiterate what has long been well settled as the law in this and other States, that a deed absolute on its face, given to secure an indebtedness, is but a mortgage, and that the character of the transaction may be shown by parol evidence.

In the case of *Chambers v. Butcher*, 82 Ind. 508, the facts and circumstances constituting the fraud were pleaded.

The following cases are in point and decisive of the question under consideration: *Green v. Groves*, 109 Ind. 519; *Caylor v. Roe*, 99 Ind. 1.

Counsel for the appellee insist, in their able brief, that in those cases the agreement was that the wife should become a purchaser of the husband's lands after they had passed by judicial sale into the hands of the mortgagee, but with equal force it may be said that the appellee was to become a purchaser of an undivided one-third of her husband's lands after Holland had acquired title thereto and the payment of her husband's debt. See *Box v. Stanford*, 13 S. & M. 93 (51 Am. Dec. 142, and note); *Wilson v. Ray*, 13 Ind. 1.

Judgment reversed, with costs, and the court below is directed to sustain the demurrer to the second paragraph of the complaint.

Filed Sept. 17, 1889.

ON PETITION FOR A REHEARING.

BERKSHIRE, J.—In the original opinion we omitted to make reference to the motion made to dismiss the appeal.

 Rollet *et al.* v. Heiman.

The ground of the motion is, that the appeal was prematurely taken; that the judgment from which it was taken was not a final judgment.

We need not repeat the nature of the action as its character fully appears in our original opinion. Where the action is one primarily for partition, an appeal will not lie from the interlocutory order of the court appointing commissioners to make partition between the parties. But in the case under consideration the orders for partition and appointment of commissioners were mere incidents to the judgment and decree of the court as rendered.

The principal questions involved were the title to the real estate in controversy, the right to the possession thereof, and whether or not the appellee, Mrs. Myers, was entitled to recover damages. As to all of these principal questions the judgment of the court was a finality, and the appellant had the right of appeal.

We do not care to refer to any other question presented in the petition for a rehearing.

The petition is overruled.

Filed Dec. 14, 1889.

 No. 13,962.

ROLLET ET AL. v. HEIMAN.

Avoid Deed of.—A complaint by a judgment creditor, seeking to set aside a fraudulent conveyance, solely on account of the mental incapacity of the grantor, does not aver a good cause of action. The deed of an insane person can only be avoided by the grantor or his privies in blood or estate.

SAME.—Suit to Set Aside a Fraudulent Conveyance.—What Constitutes a Good

120	511
124	171
134	535

120	511
147	585

120	511
158	240

120	511
1169	643

Rollet *et al.* v. Heiman.

Complaint.—A complaint to set aside a fraudulent conveyance, alleging that the conveyance was accepted by the grantee with knowledge of the fraudulent purpose, and as a mere volunteer, who has paid no consideration, is a good complaint, notwithstanding an averment of the mental incapacity of the grantor.

SAME.—How Judged.—Isolated Averment.—Effect of.—Surplusage.—A pleading is to be judged from its general scope and tenor. An isolated averment will not be permitted to control the general frame and tenor of the pleading. Such an averment must be treated as mere surplusage, and surplusage will not vitiate a pleading.

From the Vanderburgh Circuit Court.

J. E. Williamson, for appellants.

D. B. Kumler, V. Bisch and G. F. Denby, for appellee.

ELLIOTT, C. J.—Heiman, the appellee, is the judgment creditor of Joseph Rollet, one of the appellants. The facts stated in the second paragraph of his complaint are, in substance, these: The plaintiff recovered judgment against Rollet for \$347, the judgment is unsatisfied, and the debtor has no other property subject to execution. At the time of the execution of the promissory note upon which the judgment is founded, Rollet owned real estate of the value of five thousand five hundred dollars, and he also owned personal property of the value of eight hundred dollars. He was the owner of this property on the 27th day of October, 1883, the note was executed on the 28th day of April, 1883, and the judgment on it was recovered on the 4th day of February, 1884. Rollet, by reason of the excessive use of intoxicating liquors, was incapacitated from engaging in ordinary business pursuits. Nurrenbarn is the brother-in-law of Rollet, and on the 27th day of October, 1883, induced the latter to convey to him all of his property. The deed was executed by Rollet and wife conveying to Nurrenbarn the real estate then owned by Rollet. The consideration for the conveyance was the promised payment of thirty-nine hundred dollars, and the assumption by the grantee of two mortgages on the property. The property was worth at least

Rollet *et al.* v. Heiman.

three thousand dollars more than the price fixed. The consideration expressed in the deed was not paid by the grantee. The alleged payment of thirty-nine hundred dollars was, in fact, not made, but was pretended to be made by the release of debts due from Rollet to Nurrenbarn, which debts were mere fictions, having no existence. Immediately after the execution of the deed, Nurrenbarn made a gift of a great part of the personal property to Sophia Rollet, the wife of the judgment debtor. The conveyance was made with the intent to cheat, hinder, and delay the creditors of Rollet, and it was accepted by the grantee with full knowledge of all the facts.

The complaint is not well drawn. It contains much that is mere matter of evidence, and such matter obscures and weakens a pleading. We attach no importance whatever to the argument of the counsel that the complaint describes many badges of fraud, and is, therefore, good; for badges of fraud are simply matters of evidence, and in pleading it is the facts and not the evidence that must be alleged. The complaint contains matters which are not proper in a complaint by a judgment creditor to set aside a fraudulent conveyance, and these matters so confuse the pleading as to make it somewhat difficult to determine its character.

If the complaint sought simply to set aside the conveyance because of the mental incapacity of Rollet, we should be strongly inclined to hold that no cause of action was shown to exist in the judgment creditor. We believe the law to be against the right of a judgment creditor to set aside such a conveyance as fraudulent, for we think that the deed of an insane person can only be avoided by the grantor or his privies in blood or estate. *Price v. Jennings*, 62 Ind. 111; *Shrock v. Crowl*, 83 Ind. 243; *Campbell v. Kuhn*, 45 Mich. 513; *Breckenridge v. Ormsby*, 1 J. J. M. 236.

A pleading, as we have often held, is to be judged from its general scope and tenor, and so this complaint must be judged. Judging it by this established rule we can not allow

Wasson, Treasurer, v. Lamb, Assignee.

the isolated averment of Rollet's mental incapacity to control the general frame and tenor of the pleading. This averment, like those of matters of evidence, must be treated as mere surplusage, and surplusage will not vitiate a pleading. Our judgment is, that the complaint is to be regarded as one to set aside a fraudulent conveyance accepted by the grantee with knowledge of the fraudulent purpose, and as a mere volunteer who has paid no consideration.

Judgment affirmed.

Filed Nov. 2, 1889.

No. 14,284.

WASSON, TREASURER, v. LAMB, ASSIGNEE.

120 614
153 521

INJUNCTION.—*Taxes.—Receipts for.—Transfer of to Bank.—Cash Credit.—Payment.—County Treasurer.—Assignment.—Lien.—Fraud.*—Where a county treasurer transfers to a bank receipts for taxes due from it, receiving credit therefor as for so much cash deposited, and checks against it, drawing the amount out of the bank, in the absence of fraud the transaction is consummated as if the bank had paid the taxes in cash and received the money on deposit; and after an assignment by the bank, an injunction will lie to prevent the enforcement of the alleged lien for said taxes.

BANK.—*Receipts for Taxes.—Deposit.—When Considered Made.—Pass-book Entry.—Misrepresentations of Solvency.*—Although the credit for the amount of the tax receipts is not entered on the books of the bank until five days after it is credited in the pass-book, the deposit will be deemed to have been made when credited in the pass-book; and a county treasurer who after that time checks out more than he deposits, including the amount credited for taxes, is uninjured by misrepresentations of the solvency of the bank.

SAME.—*Debits and Credits.—Entry of.—Balance.—When Considered Struck.*—Where money is paid into and drawn out of a bank, or other debts and

 Wasson, Treasurer, v. Lamb, Assignee.

credits are entered by the consent of both parties in the general banking account of the customer, a balance may be considered struck at the date of each payment or entry on either side of the account.

SAME.—*Deposit*.—*Cashier*.—*Bank-book Entry*.—*Effect of*.—*Admissions*.—

Where a deposit is made, the amount and date thereof being entered by the cashier or teller in the bank-book of the depositor, such entries, when made by the proper officer, bind the bank as admissions.

SAME.—*Checks and Drafts Received as Deposits*.—*Title to Same*.—*Liability of Bank*.—*Depositor*.—If checks, drafts, or other evidence of debt are received in good faith as deposits, the bank crediting them as so much money, the title to the checks or drafts is immediately transferred to the bank, which becomes legally liable to the depositor as for so much money deposited.

From the Marion Circuit Court.

J. S. Duncan, C. W. Smith and J. R. Wilson, for appellant.
R. Hill, for appellee.

MITCHELL, J.—This is an appeal from a judgment and decree of the Marion Circuit Court, by which Wasson, as treasurer of Marion county, was perpetually enjoined from asserting or enforcing an alleged lien for taxes against certain real estate which had been transferred to Robert M. Lamb, as the assignee of Alfred and John C. S. Harrison. The question for decision arises upon the following facts: In April, 1884, Wasson was the treasurer of Marion county, and for some months prior thereto kept an account in Harrison's bank, a private banking house owned and conducted by Alfred and John C. S. Harrison in the city of Indianapolis. With a view of inspiring confidence in the solvency of the firm, and to induce the appellant to believe that their bank was a safe place for the deposit of money, one of the partners at divers times prior to the 23d day of April, 1884, falsely represented to him that the firm was solvent. These representations, although relied on by the appellant, were known to be false by the member of the firm who made them. On the date above mentioned, the appellant, as county treasurer, delivered to the partner above referred to receipts for taxes due from himself and the firm, and others, to the

Wasson, Treasurer, v. Lamb, Assignee.

amount of \$2,086.65, that amount being at the same time entered as a credit on the pass-book, or bank-book, in which the appellant kept the account of his deposits and checks with the bank. At the time the receipts were delivered and the credit entered as above, the appellant marked the taxes as having been paid on the tax duplicate, and charged himself with the several amounts. This credit included the amount assessed and due as the taxes, the collection of which was enjoined by the decree from which this appeal is prosecuted. It appears that the credit for the amount of the receipts was not entered on the books of the bank until the 28th day of April, 1884, five days after it was credited by a member of the firm on the appellant's pass-book, at which time the balance to his credit was \$49,764.67. The appellant's bank-book was balanced on the 10th day of May, 1884. The balance included the amount of the tax receipts. After that date the appellant made deposits and drew checks against his balance until in July, 1884, when, the bank being insolvent, suspended payment and made an assignment, with a balance standing to the credit of the appellant amounting to \$9,233.72. If the amount of the tax receipts is considered as having been deposited in the bank as of the date the credit was entered on the appellant's pass-book, then he has drawn out more than he deposited since that date, including the \$2,086.65. If, however, it is not to be considered as deposited until it was entered on the books of the bank, no part of it has been since drawn out. The learned court below was of the opinion that the deposit should be considered as made when the appellant was credited with the amount on his pass-book, and that having since that time checked out more than he has since deposited, including the amount credited for taxes, he was in no way injured by the misrepresentations concerning the solvency of the bank.

This conclusion is unquestionably correct. The general rule which governs in keeping the account between a bank and a depositor is, that as money is paid in and drawn out,

Wasson, Treasurer, v. Lamb, Assignee.

or other debts and credits are entered by the consent of both parties, in the general banking account of the customer, a balance may be considered as struck at the date of each payment or entry on either side of the account. *Nat'l Mahaiwe Bank v. Peck*, 127 Mass. 298; *Lamb v. Morris*, 118 Ind. 179. Ordinarily, whenever a deposit is made the amount and date thereof are entered by the cashier or teller in the bank-book or pass-book of the depositor, and such entries when made by the proper officer bind the bank as admissions. In some cases it has been held that they become conclusive upon the bank like an account stated, when the bank-book is balanced. *Morse Banks* (3d ed.), section 291. The settled rule is, where checks, drafts, or other evidences of debt are received in good faith as deposits, if the bank credits them as so much money, the title to the checks or drafts is immediately transferred to the bank, and it becomes legally liable to the depositor as for so much money deposited. *Gragie v. Hadley*, 99 N. Y. 131; *Metropolitan Nat'l Bank v. Lloyd*, 90 N. Y. 530. So, where a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money. "Nor can the bank recall or repudiate the payment, because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though when the payment was made, the officer making it labored under the mistake that there were funds sufficient." *City Nat'l Bank, etc., v. Burns*, 68 Ala. 267; *Bolton v. Richard*, 6 Term, 139; *Oddie v. Nat'l Bank*, 45 N. Y. 735 (6 Am. Rep. 160).

Where, therefore, the holder of a check, or other genuine instrument representing a fixed sum, delivers it to a bank and receives an unqualified credit as for a definite sum of money, the transaction is equivalent to an actual deposit of so much cash as of the date of the credit. *National Bank v. Burkhardt*, 100 U. S. 686. Thus, in *Titus v. Mechanics' Nat'l*

Wasson, Treasurer, v. Lamb, Assignee.

Bank, 35 N. J. L. 588, a dispute having arisen concerning the title to certain checks, the court said: "They were received and credited in a cash account as cash. * * By such crediting, the bank became the owners of these bills, as they do of legal tender notes or bank bills so deposited. And had the defendants failed the next day, the plaintiffs could not have demanded these identical checks as their property, left for collection, against a receiver or an assignee in bankruptcy; the plaintiff had received the price of these checks by having it credited on their overdrafts, and by drawing for it." *Hoffman v. First Nat'l Bank*, 46 N. J. L. 604; *Morse Banks*, sections 569, 570.

In like manner, according to the opinion of Lord ELDON, if bills are deposited and entered in the customer's account as cash, with his knowledge and consent, so that he becomes entitled to draw against the amount, he will thereby be precluded from claiming the bills. *Ex Parte Sargeant*, 1 Rose 153; *Ayres v. Farmers, etc., Bank*, 79 Mo. 421; *Story Agency*, section 228, note.

Upon principle, there can be no reason why, if parties choose to treat a deposit of paper, or other securities, as cash, so that it is available to the depositor as cash, the transaction should not be regarded as equivalent to a deposit of money. Thus, as was said by WALLACE, J., in *St. Louis, etc., R. W. Co. v. Johnston*, 27 Fed. Rep. 243: "When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper. If the customer assents to such action on the part of the bank by drawing checks against the credit, or in any other way, he manifests with equal clearness his intention to be treated as

Wasson, Treasurer, v. Lamb, Assignee.

a depositor of money." If by mutual consent the bank and the appellant chose to treat the tax receipts as so much cash deposited to the credit of the latter, the transaction must be regarded according to the intention of the parties at the time.

The conclusion which follows from what has preceded is, that when the appellant transferred the tax receipts to the bank and received credit for the amount thereof, the transaction was, in legal effect, the same as if he had deposited the amount in cash. He had the right to draw his check against it the next moment after the credit was entered precisely as if he had made the deposit in money. Moreover, the court finds that he did check against it, so as to actually draw the amount out of the bank. This being so the result is, assuming that there was no fraud in the transaction, when the tax receipts were delivered and the taxes marked paid on the duplicate, and the appellant was credited on his bank book with \$2,086.65, as cash, he, in legal effect, received the amount of the taxes in cash and the transaction was consummated and closed precisely as if the bank had paid the taxes and then received the money on deposit from the appellant on the 23d day of April, 1884. *National Bank v. Burkhardt, supra.*

We need not enquire whether or not the facts found present such a case as would have entitled the appellant to set the transaction aside on the ground of fraud, and obtain a preference over other creditors of the bank. It is enough to say, that having received credit as for so much cash deposited, and having checked out a sum of money after the credit was given him, which included the amount of the tax receipts, for which he obtained credit, he is not in a situation to say that the taxes, which he claims the right to collect, were not, in fact, paid. He must stand precisely as any other depositor whose money was obtained by the false representations of the officers of the bank, since he has been content to let the transaction stand until, by the assignment,

Jackson v. Smith.

the rights of other creditors, who may be in like situation with him, have intervened. There was no error.

The judgment is affirmed, with costs.

Filed Nov. 1, 1889.

No. 14,626.

JACKSON v. SMITH.

MUNICIPAL CORPORATION.—*Cities.*—*Common Council.*—*Jurisdiction.*—*Local Improvements.*—In the matter of local improvements jurisdiction is conferred upon municipal corporations over the whole subject thereof, and the common councils of those corporations are invested with exclusive original jurisdiction.

JURISDICTION.—*Extent of.*—*Tribunal.*—*Cases of a General Class.*—Where a tribunal has jurisdiction of a general class of cases, every case of that class is within the subject of the tribunal's jurisdiction. Any movement in a case belonging to a class over which the tribunal has authority is jurisdiction. *Allen v. Jones*, 47 Ind. 438, modified; *Naltner v. Blake*, 56 Ind. 127, distinguished.

SAME.—*Of Subject and Person.*—*Void Judgment.*—*Statutory Requirements.*—*Non-Compliance with.*—*Effect of.*—Where it appears that a case is one of a general class over which the tribunal has jurisdiction, the judgment is not absolutely void if the particular subject was within the territorial jurisdiction of the court, and there was jurisdiction of the person, although the statutory requirements may not all have been complied with by the tribunal or its officers.

DRAINAGE.—*Assessment for.*—*Common Council.*—*Jurisdiction of.*—*Collateral Attack upon.*—*Suit to Quiet Title.*—An assessment for construction of sewer drainage is within the subject of the jurisdiction of the common council, and can not be declared void in a collateral attack to quiet title to land sold for the assessment, unless it appears there was no authority over the particular improvement ordered or the particular property assessed.

SAME.—*Local Assessment.*—*Sale of Land for.*—*Quieting Title.*—*General Decree.*—*Payment of Lien.*—*Void Assessment.*—One who seeks to quiet title to land

180	590
181	251
181	399
181	537
180	590
186	109
186	188
186	410
186	461
187	315
120	520
128	308
120	520
130	410
130	517
130	588
120	520
131	115
131	333
181	420
132	104
132	250
130	520
135	178
120	520
140	254
143	343
120	520
147	156
120	520
152	578
120	520
153	241
120	520
154	378
130	520
162	456
162	457
162	486

Jackson v. Smith.

sold for an assessment for drainage is not entitled to a general decree while any part of the assessment is due; one who would save his title must pay, or tender payment of, the lien. Unless the assessment is wholly void he is not entitled to a general decree.

SAME.—*Way Improved.*—*City's Ownership of.*—*How Disproved.*—Where an improvement has been made and property benefited, the property-owner seeking afterwards to show that the way improved did not belong to the city, must show that it was not acquired by condemnation, purchase, dedication, or prescription.

From the Howard Circuit Court.

J. E. Moore, M. Garrigus and J. O'Brien, for appellant.

J. C. Blackledge, W. E. Blackledge and B. C. Moon, for appellee.

ELLIOTT, C. J.—This controversy arises out of the proceedings of the common council of the city of Kokomo ordering that walls be placed along the banks of a watercourse, which flows through the city and is part of its system of drainage, and directing an assessment upon private property to pay the expense of making the improvement. The appellant seeks to quiet her title and asserts that the proceedings were absolutely void.

It will make our path the easier to travel if we first dispose of some matters which, although of a preliminary nature, are important. This action is a collateral and not a direct attack upon the proceedings, and, as has been held, again and again, if there was jurisdiction of the subject and the person it must fail, no matter how many or how grave the errors and irregularities that may have been committed. *Montgomery v. Wasem*, 116 Ind. 343, and authorities cited. In the matter of local improvements jurisdiction is conferred upon municipal corporations over the whole subject of local assessments, and the common councils of those corporations are invested with exclusive original jurisdiction. Why those tribunals do not have general jurisdiction of the subject it is not easy to perceive, for no other tribunal can have original jurisdiction. It is true that the jurisdiction is stat-

Jackson v. Smith.

utory, but that is true of all our courts of original jurisdiction to a very great extent, and they can not be said to be—at all events it never has been judicially said that they are—courts of such limited jurisdiction as renders their judgments open to collateral attacks where there is authority to proceed at all, although there may be many errors; nor can it be justly said that where there is authority to proceed there is no jurisdiction, for the authority to proceed is jurisdiction. *Board v. Markle, etc.*, 46 Ind. 96; *State v. Commonwealth*, 12 Peters, 657; *Dequindre v. Williams*, 31 Ind. 444. It has, on the contrary, been often asserted that in such cases collateral attacks are unavailing. As jurisdiction is conferred over the whole subject of local assessments for local improvements in cities, it seems to clearly follow that in every case a local assessment is within the subject of the court's jurisdiction. We do not affirm that the particular case is always within the jurisdiction of the inferior tribunal, for there may be no authority over the person or the particular property involved in the particular case, but what we affirm is, that a local assessment is always within the subject of the tribunal's jurisdiction. In affirming this we do no more than affirm that where the tribunal has jurisdiction of a general class of cases, every case of that class is within the subject of the tribunal's jurisdiction, for by the term subject can only be meant cases of a general class. The circuit court has jurisdiction of actions for the recovery of real property, and every action of that character is within the subject of the court's jurisdiction, but it may often happen that the court has no jurisdiction over the subject of the particular action; as, for instance, the court may not have jurisdiction of the particular tract of land involved in the controversy. It remains true, nevertheless, in every instance of the kind mentioned, that there may be jurisdiction of the general subject of controversies respecting real property, and yet no jurisdiction of the subject-matter of the particular case. There is, therefore, a difference between

Jackson v. Smith.

the subject of the court's jurisdiction and the subject-matter of the particular action, for the subject of the court's jurisdiction is a class, but the subject-matter of a particular case is a single thing, not a multitude of things. Our cases, and there are many of them, which hold that where the case belongs to a general class over which a tribunal has jurisdiction, a judgment rendered in it is not absolutely void although the notice may be defective, or some steps may not have been taken that were necessary to fully impress regularity and legality upon the proceedings, are strongly intrenched in principle. *Johnson v. State*, 116 Ind. 374; *Hobbs v. Board, etc.*, 116 Ind. 376; *Otis v. DeBoer*, 116 Ind. 531; *Montgomery v. Wasem, supra*; *Prezinger v. Harness*, 114 Ind. 491; *Robinson v. Rippey*, 111 Ind. 112; *Strieb v. Cox*, 111 Ind. 299; *Pickering v. State*, 106 Ind. 228; *Argo v. Barthand*, 80 Ind. 63; *Ricketts v. Spraker*, 77 Ind. 371. In *Ross v. Stackhouse*, 114 Ind. 200, effect was given to this general principle in proceedings to enforce an assessment for a street improvement ordered by a municipal corporation. The same general principle was recognized in *City of Elkhart v. Wickwire*, 22 N. E. Rep. 342, and held applicable in local assessments levied for the purpose of constructing a sewer.

The general conclusion which we here seek to deduce and apply is, that our decisions (which, as we believe, may be vindicated on the soundest principle) declare that where it appears that the case is one of a general class over which the tribunal has jurisdiction, that is, one within the subject of the tribunal's jurisdiction, the judgment is not absolutely void if the particular subject was within the territorial jurisdiction of the court, and there was jurisdiction of the person, although the statutory requirements may not all have been complied with by the tribunal or its officers. The application of this general conclusion to the case in hand authorizes the judgment that the assessment assailed was within the subject of the jurisdiction of the common council, and,

Jackson v. Smith.

therefore, it can not be declared void in this collateral attack unless it appears that there was no authority over the particular improvement ordered or the particular property assessed.

We come now to what may be regarded as the second of the preliminary questions. The appellant was not entitled to a general decree quieting title if any part of the assessment was due. It is a general principle of wide application, that one who seeks to save his title can not do so if a lien exists upon it unless he pays, or tenders payment of, the lien. *City of Indianapolis v. Gilmore*, 30 Ind. 414; *Morrison v. Jacoby*, 114 Ind. 84; *City of Elkhart v. Wickwire*, *supra*. We do not assert that in the proper case there may not be a qualified decree, that is, one preserving the lien, but declaring the fee to be in the plaintiff, but we do affirm that the appellant could not, if any lien existed, sweep it away by a general decree quieting title. The effect of such a general decree as against parties to the action is to sweep away all claims that cloud the title. *Ragsdale v. Mitchell*, 97 Ind. 458; *Watkins v. Winings*, 102 Ind. 330; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581.

The application which we here make of this principle is that we can not decide that the court below erred in giving judgment in the appellee's favor, unless we find the assessment to be utterly void, for if not void, the appellant has no right to a general decree. We do not decide whether irregularities will prevent the acquisition of title, but we do decide that they will not always render an assessment absolutely void. It may well be that the courts will establish a lien and yet not adjudge that title was acquired under the sale upon an assessment. It is a matter of frequent occurrence in cases arising out of sales for taxes, to deny that title passes and yet declare a lien. We make, and mark as distinctly as we can, a difference, between cases where the question is whether title passes and cases where the question is whether a lien shall be upheld. If the appellant had asked

Jackson v. Smith.

a qualified decree we should have a radically different case before us. The courts are, and with good reason, reluctant to permit title to be acquired under a sale for taxes or local assessments; but they should not be reluctant to preserve the lien for the expense of making a local improvement, for the reason which justifies them in preventing the acquisition of title completely fails when the question is whether an assessment shall be upheld. The assessment is made upon the theory that the benefit to the property is equivalent to the expense. The owner, therefore, receives a thing of value, and he ought, in equity and good conscience, to pay for it, notwithstanding the fact that the local officers may not have obeyed the statute in every regard. It is just to protect his title when he offers to pay for the thing of value rendered him in the form of the benefit resulting from the improvement, but it is not just to relieve him from paying the assessment because the local officers have made mistakes.

The principal question in the case arises upon the contention of appellant's counsel that the municipal corporation had not acquired by purchase or condemnation the right to construct walls upon private property, and that the assessment is therefore void. The first case cited in support of this contention is *Allen v. Jones*, 47 Ind. 438. That case might be effectually disposed of by the simple affirmation that the assault which brought the assessment in question was directly made by an appeal, but we can not pass the case without saying that its authority is in many respects much weakened by the decisions of our own and other courts; at all events, we do not so pass it as to leave the impression that we fully sanction all that it decides. In so far as the case holds that there is no general jurisdiction over local assessments vested in municipal corporations, it must be disapproved, for any movement in a case belonging to a class over which the tribunal has authority is jurisdiction, provided the particular property affected and the person are within the scope of the tribunal's authority. *Board v. Markle, etc., supra*. The case

Jackson v. Smith.

of *Naltner v. Blake*, 56 Ind. 127, presents something more of difficulty, but it is readily discriminated from this case, for there the owner of the property herself complained of the unlawful entry on the land, and resisted the assessment, upon the ground that the unlawful seizure of her land conferred no right to build a wall at her expense. It must be said of that case that it did not receive much consideration, for there is little or no discussion, and not a single authority is brought to its support. The only case there cited is that of *City of Delphi v. Evans*, 36 Ind. 90, and the decision in that case is directed to an entirely different point. But it is unnecessary to very fully discuss the decision in *Naltner v. Blake*, *supra*, for it is in direct conflict with the later case of *McGill v. Bruner*, 65 Ind. 421, and is opposed to the principle declared in many other cases. *Clements v. Lee*, 114 Ind. 397; *Ross v. Stackhouse*, 114 Ind. 200; *Taber v. Ferguson*, 109 Ind. 227; *Taber v. Grafmiller*, 109 Ind. 206; *Balfe v. Lammers*, 109 Ind. 347; *Martindale v. Palmer*, 52 Ind. 411; *Palmer v. Stumph*, 29 Ind. 329; *Board, etc., v. Silvers*, 22 Ind. 491; *City of Indianapolis v. Imberry*, 17 Ind. 175. In the cases of *Holmes v. Village of Hyde Park*, 121 Ill. 128, and *Village of Hyde Park v. Borden*, 94 Ill. 26, the question arose on an assessment levied for the improvement of a street, and it was held that the property-owner could not be heard to aver that the municipal corporation had not acquired title to the street. This point was ruled upon in *Palmer v. Stumph*, *supra*, and *McGill v. Bruner*, *supra*, and the decision was the same as that of the Supreme Court of Illinois.

The decisions make a distinction between cases where the attack is made upon the proceedings before the work is completed, and those in which there is no attack until after the work has been done, and there is sound reason for this distinction. There are, no doubt, many questions which might be litigated if made before the work has been done in whole or in part, that equity requires should not be open to litigation at the suit of one who has suffered money to be expended

Jackson v. Smith.

on the faith of the validity of the proceedings. *Ritchie v. South Topeka*, 38 Kan. 368; *Balfe v. Lammers*, *supra*.

We do not decide that there may not be cases in which the property-owner might show, even after the work was done, that the way improved did not belong to the city, and could not be acquired by it; but to entitle him to relief in such a case he would be required to show an exceedingly strong case; it would not be enough to show that the way had not been acquired by condemnation, for he would be required to show that it was not acquired by purchase, dedication, or prescription. Property may be acquired in any one of three methods named, and evidence that it was not acquired in one of those methods is very far from proving that it was not rightfully acquired. *Leeds v. City of Richmond*, 102 Ind. 372; *Faust v. City of Huntington*, 91 Ind. 493. A property-owner may be precluded from asserting title where the facts equitably estop him from doing so. *City of Indianapolis v. Kingsbury*, 101 Ind. 200; *Faust v. City of Huntington*, *supra*. In this case there was not sufficient evidence to entitle the appellant to a general decree quieting title even if the question as to the right of the city to use the watercourse had been open to controversy.

Judgment affirmed.

Filed Oct. 31, 1889.

No. 14,828.

HILL v. PROBST, TREASURER, ET AL.

INJUNCTION.—*Specifications of Cause.*—*Must be Considered Separately.*—Where several specifications of cause for an injunction are assigned, they must be considered separately, and they can not aid each other.

SAME.—*Railroad Aid Tax.*—*Election for.*—*Attempt to Set Aside.*—*What Must be Averred.*—In such a case a specification that an election to vote a railroad tax is void because of failure to give proper notice, without an allegation that the board of commissioners did not levy the tax sought to be enjoined, is demurrable.

RAILROAD.—*Tax in Aid of.*—*Tax Duplicate.*—*Entry upon.*—*Presumption.*—*County Commissioners.*—*Validity of Election.*—*Collateral Attack.*—The appearance of a railroad aid tax upon the tax duplicate creates the presumption that it was levied by the board of commissioners. The validity of the election authorizing it is necessarily reviewed in making the levy, and can not be attacked in an injunction proceeding.

SAME.—*County Commissioners' Record.*—*Petition for Tax.*—*Absence of Formal Order.*—*Tax List Entry.*—*Effect of.*—Where the proceedings of the board of commissioners contain no formal order granting the prayer of a petition for a railroad aid tax, an entry of the tax in the tax list of the township petitioning for it is sufficient to show that it was assessed.

EVIDENCE.—*County Commissioners' Record.*—*Entry in.*—*Parol Testimony.*—*Inadmissibility of.*—Parol testimony is inadmissible to prove that an entry in the commissioners' record, properly signed and attested, was placed there without their authority. It is wholly immaterial who prepared the entry, or that it was prepared with or without the authority of the board of commissioners. If they adopted and passed it, it was as effectual as if it had been prepared by their order.

SAME.—*Tax Duplicate.*—*Admission of in Evidence.*—The admission in evidence of a tax duplicate showing that one who seeks to enjoin the collection of a railroad tax is delinquent as to other taxes, is not objectionable.

PLEADING.—*Injunction Proceeding.*—*Complaint.*—*Demurrer.*—Where a demurrer is sustained to certain specifications in one paragraph of complaint for injunction and is overruled as to the same specifications in a subsequent paragraph, there is no available error.

From the Dearborn Circuit Court.

G. Downey, for appellant.

J. K. Thompson, H. D. McMullen and W. B. Johnson, for appellees.

120	528
128	76
130	528
130	517
120	528
131	424
130	528
137	228
120	528
142	338
142	369
120	528
154	238
155	488
155	490

COFFEY, J.—This was an action instituted by the appellant against the appellee, as treasurer, in the Dearborn Circuit Court, to enjoin the collection of a tax voted by the legal voters of Center township, in Dearborn county, to aid the construction of a railroad.

In the original complaint the appellant, after averring the existence of the tax upon the tax duplicate of the county, alleges in four different specifications the reasons for the illegality of such tax, as follows:

1st. That said pretended election so held in said Center township was illegal and void, because the notices thereof were not posted until the 11th day of November, 1886, when the election was ordered by the board of county commissioners to be held, and was held, on the 23d day of November, 1886, the statutes of the State of Indiana in force at that time requiring that said handbills should be posted by the sheriff of the county three weeks prior to the day fixed for taking the vote of the township named in said petition.

2d. The said board of county commissioners did not at their regular June session, following said pretended election, or at any other time, make any order granting the prayer of said petition above named, nor did they in any other way, directly or indirectly, grant the said petition.

3d. The said board of county commissioners did not, at their regular June session, following said pretended election, or at any other time, make any order levying any special tax for the purpose of making such appropriation to said Louisville, Cincinnati and Dayton Railroad, as required by the statutes of the State in such cases made and provided; nor did said board at any time order said assessment of twenty cents on the one hundred dollars in valuation of the taxable property in Center township to be placed on said tax duplicate for collection, but said erroneous and illegal assessment was so placed on said tax duplicate without the

Hill v. Probst, Treasurer, *et al.*

proper order of the board of county commissioners and without authority of law.

4th. Said pretended special tax is improperly and illegally placed on said duplicate, because at the time it was so placed thereon the Louisville, Cincinnati and Dayton Railroad was not, and is not now, permanently located in said Center township.

The court sustained a demurrer to said first, third, and fourth specifications, and the appellant excepted. Appellant thereupon, with leave of the court, filed a second paragraph of complaint, in which he set out four specifications which he claims rendered the tax sought to be enjoined illegal, as follows:

1st. That said pretended election so held in Center township is illegal and void, because the notices thereof were not posted until the 11th day of November, 1886, when the election was ordered by the board of county commissioners to be held, and was held, on the 23d day of November, 1886, the statutes of the State of Indiana, in force at that time, requiring that said handbills should be posted by the sheriff of the county three weeks prior to the day fixed for taking the vote of the township named in said petition, and no notices were posted by any one acting for the sheriff, and by his authority, three weeks before said election, of which any return was made, and in fact no notices were posted.

2d. The said board of county commissioners of Dearborn county did not, at their regular session following said pretended election, or at any other time, make any order granting the prayer of said petition above mentioned, nor did they in any other way, directly or indirectly, grant the said petition.

3d. The said board of county commissioners did not, at their regular session following said pretended election, or at any other time, make any order levying any special tax for the purpose of making such appropriation to said Louisville, Cincinnati and Dayton Railroad as required by the statutes

Hill v. Probst, Treasurer, et al.

of the State in such cases made and provided ; nor did said board, at any time, order said assessment of twenty cents on the one hundred dollars in valuation of the taxable property in Center township to be placed on said tax duplicate for collection, but said erroneous and illegal assessment was so placed on said tax duplicate without any order of the board of county commissioners and without authority of law.

4th. Said pretended special tax is improperly and illegally placed on said duplicate, because at the time it was so placed thereon the Louisville, Cincinnati and Dayton Railroad was not, and is not now, permanently located in said Center township.

The court sustained a demurrer to the first and second specifications of the second paragraph of the complaint, and overruled it as to the third and fourth, and the appellant excepted.

The appellee answered in two paragraphs. The first is a general denial, and the second avers the assessment of the tax sought to be enjoined by the board of commissioners of Dearborn county, setting out a full transcript of the proceeding of the said board in the matter of the petition for the assessment of a tax in Center township to aid in the construction of the Louisville, Cincinnati and Dayton Railroad.

A demurrer was overruled to the second paragraph of the answer, and an exception taken. Upon issues formed there was a trial by the court, resulting in a finding and judgment for the appellee.

The errors assigned are :

First. That the court erred in sustaining the demurrer to the first, third, and fourth specifications of cause in the complaint.

Second. That the court erred in sustaining the demurrer to the first and second specifications of cause in the additional second paragraph of complaint.

Third. That the court erred in overruling the demurrer to the second paragraph of the answer.

Hill v. Probst, Treasurer, et al.

Fourth. That the court erred in overruling the motion for a new trial.

There seems to be no material difference in the specifications of cause in the first and second paragraphs of the complaint.

As the court overruled the demurrer to the second specification in the original complaint, and also overruled it to the third and fourth specifications in the second paragraph, there is no available error in sustaining the demurrer to the third and fourth specifications in the original complaint. If the court erred in its rulings as to these specifications, it corrected such error when ruling on the demurrer to the same specifications in the additional or second paragraph.

We need not, therefore, give the assignment of error calling in question this ruling any further consideration. The court, however, sustained the demurrer to the first specification in both the original and additional complaint, and it becomes necessary to inquire into the correctness of that ruling.

The practice of assigning several specifications of cause for an injunction in cases like this has been approved by this court as having the merit of convenience and economy of time and expense, as it saves the repetition of the whole statement of the levying of the tax with each specification of the objection thereto. The defendant in such case can either demur or answer as to each specification, and each of such specifications, when demurred to, is considered as a separate paragraph of complaint, and is considered in connection with the allegations preceding and following it in the complaint. It is evident, however, that the specifications, when so attacked, can not aid each other, but they must be considered separately. *Boden v. Dill*, 58 Ind. 273; *Mustard v. Hoppess*, 69 Ind. 324; *Hilton v. Mason*, 92 Ind. 157.

Reading the complaint in the light of this rule, and omitting all the specifications except the one now under consideration, there is no allegation that the board of commissioners did not levy the tax which the appellant seeks to enjoin. The

Hill v. Probst, Treasurer, et al.

tax is found upon the tax duplicate, and as public officers are presumed to do their duty, it must be presumed to be there lawfully, and in accordance with the prayer of the petition, until the contrary is shown. It is true that the appellant alleges in the second paragraph of his complaint that the board of commissioners took no action, and made no order about or concerning said appropriation after ordering the election, but the law made it their imperative duty at the June term following the election to assess the tax if a majority of the votes cast was favorable thereto; and such a general averment as the above is far short of an averment that at the June term following such election they did not levy such tax.

As the tax is found upon the duplicate, we must presume, therefore, in the absence of a specific showing to the contrary, that the board of commissioners levied the same. In making such levy they necessarily passed upon the validity of the election authorizing the same, and however erroneous the conclusion at which they arrived may be, it can not be attacked in a collateral proceeding like this. *Board, etc., v. Hall*, 70 Ind. 469; *Reynolds v. Faris*, 80 Ind. 14; *Hilton v. Mason, supra*.

In our opinion the court did not err in sustaining the demurrer to the first specification in either the first or second paragraph of the complaint.

In the transcript of the proceedings of the board of commissioners of Dearborn county, set out in the second paragraph of the appellee's answer, there does not appear any formal order granting the prayer of the petition for a railroad tax, or any formal order levying such tax; but in the assessment of the taxes for that year appears the following, in the list of townships, viz.:

Hill v. Probst, Treasurer, *et al.*

CENTER.	Endowment Fund.	State Tax.	County Tax.	Township Tax.	Township Tuition	Special School.	Road Tax.	Road Tax—Cash.	Town Tax.	L. C. & D. R. R. Tax.	Total Tax on each \$100.
	4	12	55	15	10	10	20	10		20	1.68½

Following this is the following language: "There being no further business before the board they now adjourn, to meet Saturday, June 18, 1887.

" (Signed)

G. A. SWALES.

" Attest: JULIUS SEVERIN, A. D. C."

It is claimed by the appellant that this is not sufficient to show an assessment of the railroad tax by the board of commissioners of Dearborn county, but we think otherwise. When construed in connection with the petition of the citizens of Center township to make an appropriation in aid of the construction of the Louisville, Cincinnati and Dayton railroad, we think it sufficiently appears that there was a tax of twenty cents on the one hundred dollars levied in that township for the purpose indicated in that petition. The court did not err in overruling the demurrer to the second paragraph of the answer.

It is claimed that the finding of the circuit court is not supported by the evidence. The record of the proceedings had before the board of commissioners, corresponding with the transcript set out in the second paragraph of the answer, was read in evidence. Under the construction we have placed upon that record it supported the finding and judgment of the court.

On the trial of the cause the appellant propounded to Mr. Severin, a witness, who had testified that he was auditor of Dearborn county at the June session of the board of commissioners, in 1887, the following question:

Hill v. Probst, Treasurer, *et al.*

“Referring to commissioners’ record No. 19, page 562, of said county, and more especially to the tabulated statement thereon, state whether or not the board of county commissioners authorized the placing in said statement of the column headed ‘L. C. & D. R. R. Tax.’”

The court sustained the objection to this question, and the appellant then offered to prove by said witness that the column in said tabulated statement referred to was not placed in said statement by order of the board of county commissioners, but was placed there by the auditor himself, of his own volition, without any order of the board of county commissioners concerning the matter, and that the board of county commissioners never, at their June session, 1887, made any order of any kind with reference to said L. C. & D. railroad tax.

The tabulated statement referred to in the question is part of the record made by the board of commissioners of Dearborn county, and it was not competent for the appellant to contradict, add to, or detract from it by parol testimony. It was not proposed to prove by the witness that any change had been made in the statement since it was passed by the board and the record signed. It was wholly immaterial who prepared the tabulated statement, or whether it was prepared with or without the authority of the board of commissioners. If they adopted and passed it, it was as effectual as if it had been prepared by their order.

The court, also, over the objection of the appellant, permitted the appellee to read in evidence the tax duplicate showing that the appellant had not paid all his taxes. We are not advised as to the object sought to be attained by the introduction of this evidence, but we can see no objection to bringing before the court the tax duplicate upon which was the tax in controversy, as well as all other taxes assessed against appellant. We are unable to see how the appellant was injured by this ruling of the court.

Leonard *et al.* v. Broughton *et al.*

We find no error in the record for which the judgment of the circuit court should be reversed.

Judgment affirmed.

Filed Nov. 1, 1889.

No. 13,211.

LEONARD ET AL. v. BROUGHTON ET AL.

180	536
193	591
120	536
138	631
120	536
143	197
120	536
170	426

JUDGMENT.—*Upon Pre-existing Obligations.*—*Purchasers at Sheriff's Sale.*—*Judgment on Official Bond.*—*Nunc Pro Tunc Entry.*—*Suit to Quiet Title.*—A suit to quiet title can not be maintained by the purchasers of real estate at a sheriff's sale on executions issued upon judgments rendered on pre-existing obligations, against the purchasers of said real estate at a sheriff's sale upon a judgment rendered against the principal and his sureties on an official bond, the last named judgment having been at first incorrectly entered up, and a *nunc pro tunc* entry for its correction having been made subsequently to the acquirement of a judgment lien by the other purchasers.

SAME.—*Rights of Parties.*—*Nunc Pro Tunc Entry.*—*Effect of.*—Where judgments are entered upon pre-existing obligations, the rights of the parties are fixed prior to the rendition of the judgments, and if it does not appear that they were not misled, or parted with anything of value, or acquired any rights during the interval between the date the judgment on the official bond should have been properly entered and the making of the *nunc pro tunc* entry, except the acquirement of a judgment lien, they are bound by the corrected judgment as of the date of the original entry.

SAME.—*Rights of Parties.*—*Nunc Pro Tunc Entry.*—*Effect of.*—Where judgments are entered upon pre-existing obligations, the rights of the parties are fixed prior to the rendition of the judgments, and if it does not appear that they were not misled, or parted with anything of value, or acquired any rights during the interval between the date the judgment on the official bond should have been properly entered and the making of the *nunc pro tunc* entry, except the acquirement of a judgment lien, they are bound by the corrected judgment as of the date of the original entry.

SAME.—*Nunc Pro Tunc Entry.*—*Who Bound by.*—*Rights of Parties.*—*How Determined.*—*Superior Equities.*—All persons are bound by the entry of a *nunc pro tunc* judgment, and their rights are to be determined as if said judgment had been at first entered and signed, unless they have some superior or intervening equities in their behalf.

SAME.—*Judgment Creditor.*—*General Lien of.*—*What Equities Subject to.*—The

Leonard *et al.* v. Broughton *et al.*

general lien of a judgment creditor upon lands of his debtor is subject to all equities existing against the lands of the judgment debtor in favor of third parties at the time of the recovery of the judgment.

SAME.—*Judgment Creditor.*—*Collection of Judgment.*—*Failure to Enforce.*—*Effect of.*—*Third Parties.*—A judgment creditor loses no rights by the mere failure to enforce the collection of his judgment, where the rights of third parties have not intervened, and he has no knowledge of their claims.

SAME.—*Upon Official Bond.*—*Real Estate.*—*When Lien Upon.*—*Corrected Judgment.*—*Lien of.*—Judgments on bonds payable to the State bind the real estate of the debtor from the date of the commencement of the action. If, in such a case, the first judgment for any reason is not binding, and the action is pending until the same is corrected, the judgment lien would relate back to the date of the commencement of the action.

EXECUTIONS.—*Issuance of After Ten Years.*—*Section 675, R. S. 1881, Construed.*—*Relates Wholly to the Remedy.*—Section 675, R. S. 1881, providing for the issuance of executions after the lapse of ten years, relates wholly to the remedy, and applies to the issuance of executions on all judgments rendered before, or after, its enactment, and is clearly within legislative authority.

SAME.—*Leave of Court to Issue.*—*Sale Made Without Leave.*—*Who can Complain of.*—*Judgment Creditor.*—Even if it should be necessary to have leave of court to issue an execution, the execution being issued and sale having been made upon it without objection from the judgment debtor, the sale made upon it would be valid, and could not be questioned by other judgment creditors.

From the Noble Circuit Court.

T. R. Marshall, W. F. McNagney and H. G. Zimmerman,
for appellants.

A. A. Chapin and R. P. Barr, for appellees.

OLDS, J.—This is an action to quiet title. There was a demurrer sustained to the complaint, and exceptions taken, and judgment on demurrer for defendants. Error is assigned as to the ruling of the court on the demurrer to the complaint.

The plaintiffs in this action are Willington Y. Leonard, Henry W. Franks and Merritt C. Skinner, and the defendants are Samuel Broughton, Jacob C. Zimmerman, Charles M. Clapp, as administrator of the estate of Milton M. Clapp, deceased, and Peter Sunday. The complaint is very lengthy

Leonard et al. v. Broughton et al.

and sets out the facts in detail and with particularity, showing that the plaintiffs became the purchasers at a valid sheriff's sale of the real estate described in the complaint, on executions duly issued upon three valid judgments rendered in the Noble Circuit Court, at various dates from the 6th day of November, 1879, and the dates of the issuing of the executions thereon, one of the judgments on which executions issued and being the senior judgment on which said executions issued, was a judgment in favor of the plaintiff Franks, rendered November 6th, 1879, for \$136.41, and costs; one a judgment rendered in favor of Uriah Franks against said Mendenhall and plaintiff Leonard, January 21st, 1880, for \$235.50, and costs, on which Leonard was surety, and the other a judgment in favor of said Uriah Franks against said Mendenhall and plaintiff Skinner, rendered January 21st, 1880, for \$577.79, and costs, on which Skinner was surety, which two last judgments for which they were respectively liable said Leonard and Skinner had paid before the issuing of said executions, and said executions were respectively issued for their use, and the executions were all duly issued and levied upon the real estate described in the complaint as the property of the principal judgment debtor, Isaac Mendenhall; that said real estate was duly advertised and sold by the sheriff of said Noble county to satisfy said executions and judgments on the 22d day of December, 1883, and the plaintiffs became the purchasers of the same for the sum of \$700, and a certificate of purchase was duly issued; that said real estate was not redeemed from said sale, and after the expiration of one year, on May 25th, 1885, on surrender of the sheriff's certificate a deed was duly issued to said purchasers; and that said \$700 purchase-money at said sheriff's sale was applied, first to the liquidation of the executions in favor of plaintiff Franks in full, and the balance applied *pro rata* to the payment of the executions in favor of said Leonard and Skinner. The complaint further alleges and sets out in detail the fact that Mendenhall made a fraudulent sale and

Leonard et al. v. Broughton et al.

conveyance of said real estate to one White on the 31st day of December, 1878, and White to Chapman, and the prosecution of an action to set aside such sale and conveyance, and that notice of such proceedings was filed in the *lis pendens* record of said county, and a recovery had in said cause and a decree entered setting aside such sale and conveyance, and an order for White and Chapman to convey the real estate, which they did, conveying the same to the plaintiffs; that by reason of such facts alleged in the complaint, the plaintiffs are the owners in fee simple of the said real estate described in the complaint.

It is then averred in the complaint that the defendants Broughton, Zimmerman, and Clapp as administrator, claim title to the same real estate in the manner following: That at the March term of said Noble Circuit Court, 1875, a certain action was therein pending wherein the State of Indiana, on the relation of James C. Stewart, auditor of Noble county, was plaintiff, and the defendants herein, Samuel Broughton and Jacob Zimmerman, and the defendant Clapp's intestate, William M. Clapp, together with Nelson Prentiss, Ephraim Cramer, Cornelius Grim, and Isaac Mendenhall, and Isaac Mendenhall as the administrator of the estate of John Mendenhall, deceased, were defendants; that said action was brought upon the bond of the said Isaac Mendenhall, theretofore late county treasurer of said county, and the said other defendants as sureties thereon, for the recovery of the sum of \$1,360, for an alleged defalcation by said Isaac Mendenhall as such county treasurer, and which sum it was alleged he had failed to account for and pay over to his successor in going out of office; that in said cause in said court, upon appearance having been by said defendants therein first entered, and upon answers filed to the complaint on said bond, and after issue joined therein, a trial was had and a finding made for the plaintiff therein, and judgment rendered by the court thereon on the 10th day of March, 1875, for \$1,360, and entered up in order-book No. 7, page 53, of said

Leonard et al. v. Broughton et al.

court, against said Isaac Mendenhall alone ; although said day's proceedings of said circuit court for said 10th day of March, 1875, including said judgment last aforesaid, were, by said clerk of said court, entered and written up in said order book of said circuit court, yet the plaintiffs say that neither said day's proceedings nor the entry of said judgment were then, or at any other time, ever signed by the judge rendering said judgment, or before whom said proceedings were had ; nor has said judgment entry and day's proceedings of said court for said day, or either of them, ever been signed by any judge of said court, or of any court, or by any judge whatever ; but, on the contrary, said day's proceedings, and said order-book entry of said judgment, each and both remain wholly unsigned by any judge of any court, or by any judge whatever.

Plaintiffs further say that, on the 8th day of January, 1878, the attorney for the plaintiff in the judgment last named filed with the clerk of said court a written precept for an execution on said judgment against said Mendenhall, so rendered on said 10th day of March, 1875, as aforesaid ; that, on the 19th day of January, 1878, pursuant to said order, said clerk issued an execution on said last named judgment, directed to the sheriff of Noble county, for service, which said writ came to the hands of the sheriff on the last named day aforesaid ; and plaintiffs say that afterwards, on the 7th day of March, 1878, the then county commissioners of said county endorsed upon said execution in writing, by them severally signed as such county commissioners, an order and direction to said sheriff to hold said writ, and not to execute the same until further orders from said county commissioners, which order is as follows : "The sheriff will await further orders before enforcing collection on the within writ. March 7th, 1878." Signed by Wm. Broughton, John P. McWilliams, and William Imes, county commissioners. And said plaintiffs say that said order and directions never having been cancelled, recalled, or modified, the said execution was

Leonard et al. v. Broughton et al.

by said sheriff held until the expiration thereof, when, on the 11th day of September, 1878, the said sheriff made return thereof to the clerk of said court, endorsed thereon, as follows: "By within order of the county commissioners, this writ was held, and the full time having expired, it is now by their order returned unsatisfied this 11th day of September, 1878. NATHANIEL P. ENGLES, *Sheriff*."

It is further averred that afterwards, on the 22d day of September, 1881, the then county auditor of said Noble county, by his attorney, filed in the office of the clerk of said court a motion to correct said judgment; that said motion was entitled as follows: "The State of Indiana, on relation of James A. Stewart, auditor of Noble county, vs. Isaac Mendenhall, Samuel Broughton, Jacob C. Zimmerman, William M. Clapp, Charles M. Clapp, administrator of the estate of William M. Clapp, deceased, Nelson Prentiss, Ephraim Cramer, Cornelius L. Grim and Isaac Mendenhall, as administrator of the estate of John Mendenhall, deceased;" that it was alleged in said motion that at the March term, 1875, of said court, the action was pending upon the bond as aforesaid, and that the defendants in said action appeared thereto; issues were joined and the cause submitted to the court for hearing and trial on an agreed statement of facts, and the court found for the plaintiff in said action against all of the defendants in the sum of \$1,438.38; and that said court thereupon rendered judgment against all of said defendants in accordance with said finding; and that, notwithstanding the finding so made and judgment so rendered and pronounced by the court, the clerk of said court, by inadvertence, mistake, and misprision, entered up said judgment in the order-book of said court for the sum of \$1,360, instead of \$1,438.38, and against the defendant Isaac Mendenhall alone, instead of against him and all of the other defendants, as the same was given and pronounced, and should have been rendered, and said motion further recited the said agreement upon which said judg-

Léonard *et al.* v. Broughton *et al.*

ment was rendered, and a copy of the entry and minutes made by the judge on the judge's docket, and said motion asked for the correction of said judgment as to the amount, changing the said amount from \$1,360 to \$1,438.38, and by making the same a judgment against all of said defendants instead of a judgment against said Isaac Mendenhall alone, and upon the making of such corrections that the order-book entry be signed, and that such correction be made now as of said March 10th, 1875; that the defendants named in said motion, except said Cornelius Grim and Ephraim Cramer, appeared to said motion, and filed their answers therein; that upon issue being joined in said cause or proceeding on said motion and answers, the same was submitted to the court for hearing and trial. Whereupon, on the 10th day of January, 1883, the court found for the relator and made an order directing said judgment to be entered up against all of said defendants, *nunc pro tunc*, for the sum of \$1,360, which order and judgment was thereupon, by the clerk of said court, entered up in the order-book of said court and signed by the judge, but that the original order-book entry was not, nor has it ever been, signed by any judge. And it is further averred that long before the filing of said motion and the making of said *nunc pro tunc* entry, the term of office of said Stewart had expired, and said Keiser had been elected and was serving as his successor; that afterwards, on the 2d day of April, 1883, and without having first applied and obtained leave of court therefor to issue an execution on said alleged judgment of March 10th, 1875, a precipe was filed, and an execution was issued on the judgment so ordered, on the 10th day of January, 1883, to be entered up, *nunc pro tunc*, and delivered to the sheriff of said county, and he levied the same upon the real estate in controversy, described in the complaint, and said sheriff duly advertised and sold the same on the 19th day of May, 1883, to defendants, appellees herein, Broughton, Zimmerman, and Clapp, and issued to them a certificate of purchase for the same, and at the ex-

Leonard et al. v. Broughton et al.

piration of one year from such sale a deed was duly issued to said defendants for the same, and defendants now claim title to said premises by virtue of said sale and sheriff's deed, and not otherwise; that before said last named sale to defendants, the said defendants had full knowledge and notice of all the rights and claims, legal and equitable, in and to said real estate of said plaintiffs; that at the time of the rendition of said judgment of March 10th, 1875, against said Isaac Mendenhall, the said Mendenhall then was, and thereafter continued to be, until the 31st day of December, 1878, the owner and in the open and notorious possession of a large amount of personal property subject to execution, in said county, of the value of \$2,000; that from March 10th, 1875, to December 31st, 1878, said judgment against Mendenhall for \$1,360, with interest and costs, could have been collected of said Mendenhall and made out of the personal property aforesaid had the said plaintiff and the said plaintiff's relator, his agents and attorneys in said last named judgment, or either of them, exercised due and reasonable diligence in that behalf, but that they took no steps toward the collection of the same; that, on the contrary, plaintiffs had used all possible diligence for the collection of their judgments.

It is further averred that the defendants herein permitted said lands to become delinquent for the non-payment of taxes, and permitted the same to be sold on the 9th day of February, 1885, by the treasurer of Noble county, for taxes then due and accrued thereon, in the sum of \$116.48, and defendants became the purchasers for said sum at said tax sale, and paid said sum, and took a certificate of purchase for the same, and still hold and retain said certificate of purchase.

That said claim of title to said real estate by said defendants in virtue of and by reason of the matters and facts in the premises alleged, is adverse to the plaintiffs thereto, and that said defendants' claim of title by reason of the facts al-

Leonard *et al.* v. Broughton *et al.*

leged is without right, unlawful, and unfounded, and casts a cloud upon the plaintiffs' title. Prayer for quieting plaintiffs' title.

We have stated in brief the material allegations in the complaint.

By the averments in the complaint, it appears that the execution sale, at which the appellants herein became purchasers of the real estate, was made to satisfy three executions, one issued on a judgment rendered in favor of appellant Franks against Isaac Mendenhall, one issued on a judgment rendered in favor of Uriah Franks against Isaac Mendenhall and appellant Leonard, Leonard being surety, and having paid the judgment and execution issued for his use, and the other issued, on a judgment rendered in favor of Uriah Franks against Isaac Mendenhall and appellant Skinner, Skinner being surety and having paid the judgment execution issued for his use; the two latter judgments were rendered on the same date and subsequent to the former and the proceeds of the sale were applied first to the payment of the senior judgment in favor of appellant Franks, and the balance applied *pro rata* on the two junior judgments, and they stand in the position of judgment creditors holding judgments rendered on pre-existing debts, and no averments as to having parted with anything of value or extending credit to the judgment debtor on the faith of his real estate being unencumbered.

It is important first to consider the effect of the *nunc pro tunc* entry of the judgment. The court, on the 10th day of January, 1883, entered up a judgment as of the date of March 10th, 1875, for \$1,360. This judgment was entered of record in the order-book and signed by the judge.

The effect of this record was to enter a judgment as of the former date, and when entered it stood as a judgment of that date, and had the same effect as if it had been properly entered of record and signed by the judge on March 10th, 1875.

Freeman, in his work on Judgments, states the law in regard to *nunc pro tunc* entry of judgments thus: "The entry

Leonard *et al.* v. Broughton *et al.*

of judgments or decrees *nunc pro tunc*, is intended to be in furtherance of justice. It will not be ordered, so as to affect third persons, who have acquired rights, without notice of the rendition of any judgment. Generally such conditions will be imposed as may seem necessary to save the interests of third parties, who have acted *bona fide*, and without notice; but if such conditions are not expressed in the order of the court, they are, nevertheless, to be considered as made a part of it by force of the law." Freeman Judgments (3d ed.), section 66.

And in section 67 he says: "With the exception pointed out in the above section, a judgment entered *nunc pro tunc* must be everywhere received and enforced, in the same manner and to the same extent as though entered at the proper time. Though an execution may have issued, and proceedings under it culminated by the sale of property, when there was nothing on the record to support it, yet the omission was one of evidence and not of fact, and the evidence being supplied in a proper manner, full force and effect will be given to the fact as if the evidence had existed from the beginning."

This we regard as a correct statement of the law, and if the appellants are not within the exception, and have not in good faith acquired rights without notice of the rendition of any judgment, they are bound by the judgment as if correctly rendered and entered as of the former date. It is, therefore, important to inquire into the transaction and determine whether or not the appellants acquired any *bona fide* rights between the date of the judgment of March 10th, 1875, and the date of the correction, in January, 1883, for the plaintiffs herein are bound by the judgment, and their rights are to be determined the same as if said judgment had been properly entered and signed on March 10th, 1875, unless they have some superior or intervening equities in their behalf. The facts alleged show, and the court has adjudicated, that the plaintiff in the case of the State, *ex rel. Stewart, v.*

Leonard et al. v. Broughton et al.

Mendenhall et al., was entitled to a judgment for the amount for which it was rendered on March 10th, 1875, which was prior to the rendition of any of the judgments in favor of plaintiffs. Under the facts alleged, and in equity, these appellees were entitled to a prior judgment lien to the appellants, but by an omission in the entering and signing of the judgment it is contended they did not acquire a valid lien, and the court, on proper showing, restored their rights and entered their judgment of the proper date.

It appears from the facts averred that the judgments in favor of the appellants were rendered upon pre-existing obligations; their rights were fixed prior to the rendition of the judgments, and it does not appear that they were misled or that they parted with anything of value, or acquired any rights during the interval which elapsed between the date the judgment should have been properly entered and the making of the *nunc pro tunc* entry, except that they acquired a judgment lien; and the rule is, that the general lien of a judgment creditor upon lands of his debtor is subject to all equities existing against the lands of the judgment debtor in favor of third persons at the time of the recovery of the judgment. Parol trusts may be established, showing the apparent owner had no interest in the lands subject to the lien of a judgment, and a satisfaction of a judgment may be set aside against junior judgment lien holders; and the facts alleged show that the sale was to the appellees before the sale to the appellants of the real estate in question in this case. *Lapping v. Duffy*, 65 Ind. 229; *Wainwright v. Flanders*, 64 Ind. 306; *Travellers Ins. Co. v. Chappelow*, 83 Ind. 429; *Peck v. Williams*, 113 Ind. 256.

We do not think a judgment creditor can be said to have acquired any rights. *Herbert v. Mechanics, etc., Ass'n*, 90 Am. Dec. 601; *Thompson v. Rose*, 41 Am. Dec. 121.

And the appellants have no superior or intervening equities which prevent the *nunc pro tunc* entry of the judgment from operating against them, and their rights are to be meas-

Leonard *et al.* v. Broughton *et al.*

ured and determined as if the judgment had been properly entered and signed as of the original date. The correction of the judgment placed the parties in the same attitude they would have been if the omission to enter up the record had not occurred.

But if this theory is incorrect, the conclusion is manifestly correct, for other reasons.

Judgments on bonds payable to the State bind the real estate of the debtor from the date of the commencement of the action, and the action upon the bond must be considered to have been commenced prior to March 10, 1875; and if the first judgment is illegal, or amounted to no judgment at all, of which appellants were bound to take notice, and the action was pending until judgment was rendered upon the motion in January, 1883, the lien would antedate the other judgment liens. *Fleenor v. Taggart*, 116 Ind. 189; *Deming v. State, ex rel.*, 23 Ind. 416.

Taking the view we have in regard to the *nunc pro tunc* entry, it is unnecessary to consider the force and effect of the judgment as entered prior to the correction, and this, in effect, disposes of the case; for, as the complaint shows, the appellees had a judgment lien, and the appellants were not entitled to a judgment against them quieting their title to the real estate; but as the question is presented as to the right to have execution issue on the judgment after the expiration of five years from the rendition thereof, we will pass upon it. The execution issued in 1883; section 674, R. S. 1881, was in force at that time, and it provides that "Writs of execution, as now used for the enforcement of judgments, are modified in conformity to this Act; and any party in whose favor judgment has been heretofore or shall hereafter be rendered may, at any time within ten years after the entry of judgment, proceed to enforce the same as provided in this Act."

Section 675 provides that after the expiration of ten years execution can only issue on leave of court. This statute re-

Leonard et al. v. Broughton et al.

lates wholly to the remedy, and applies to the issuing of execution on all judgments, whether rendered before or after its enactment, and is clearly within legislative authority. *Flinn v. Parsons*, 60 Ind. 573; *Henderson v. State, ex rel.*, 58 Ind. 244; *Pierce v. Mills*, 21 Ind. 27.

Even if it had been necessary to have had leave of court to issue the execution, the execution having issued and sale made upon it without objection from the judgment debtor, it can not afterwards be questioned, and the sale made upon it would be valid and can not be questioned by other judgment creditors. *Jones v. Carnahan*, 63 Ind. 229; *Mavity v. Eastridge*, 67 Ind. 211; *Johnson v. Murray*, 112 Ind. 154; *Rose v. Ingram*, 98 Ind. 276; *Richey v. Merritt*, 108 Ind. 347; *Hollcraft v. Douglass*, 115 Ind. 139.

There is no force in the allegations in the complaint that the judgment defendant, Mendenhall, had personal property out of which the judgment might have been collected prior to December 31st, 1878. During that time there were no other judgments against Mendenhall, and no allegations even in the complaint that the relator, or plaintiff, in the action upon the bond had any knowledge of the appellants' claim, and a judgment creditor loses no rights by the mere failure to enforce the collection of his judgment. There is no error in the record.

Judgment affirmed, with costs.

MITCHELL, J., took no part in the decision of this case.

Filed Nov. 2, 1889.

The Louisville and Nashville Railroad Company v. Bisch.

No. 13,874.

**THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v. BISCH.**

120	549
152	671
120	549
155	481

RAILROAD.—Freight Train.—Injury to Passenger.—Refusal to Leave Platform.

—Assumption of Risk.—A passenger who remains on the platform of a car at the rear end of a long freight train, after a request or order from the employees of the railroad to enter the car, voluntarily occupies a place of danger, and assumes the risk of being thrown from the car and injured by the sudden jerk of the train on being put in motion.

SAME.—Mode of Travel Adopted.—Risks Incident to.—Passenger's Assumption of.—Passengers assume the risks incident to the means of transportation adopted, and one who takes passage on a freight train, although with a caboose attached, must take notice of the character of the train and use such ordinary care to avoid injury as the nature of the mode of travel will admit; one of the risks to be guarded against being that arising from the sudden jerk of the train on starting, due to the taking up of slack between the cars.

SAME.—Direction of Company's Employees.—Passenger's Observance of.—Resulting Injury.—Carrier's Liability.—A passenger is justified, as a general rule, in obeying the directions of the employees of the carrier, and if he receives injury in obeying them, the carrier is liable, even if it appears that if the passenger had not obeyed he would have escaped injury.

SAME.—Instruction.—Carrier's Liability.—Erroneous Statement of.—An instruction which states in substance that notwithstanding the warning given to the passenger, and his disobedience of the same, he would be entitled to recover, if the conductor of the train, at the moment of giving the signal to start, saw the passenger in a position which the conductor knew to be dangerous, and without giving him a reasonable time to enter the car, and by a sudden jerk in starting the cars the passenger was injured, is erroneous.

From the Warrick Circuit Court.

J. M. Shackelford and *S. B. Vance*, for appellant.

G. F. Denby, *D. B. Kumler*, *A. Gilchrist* and *C. A. De Bruler*, for appellee.

ELLIOTT, C. J.—The appellee entered a car at the rear

The Louisville and Nashville Railroad Company v. Bisch.

end of a freight train standing on the appellant's track. He rightfully entered the car as a passenger. After remaining in the car a short time he walked out upon the rear platform, and while standing there the train was started with a sudden jerk and he was thrown to the ground and injured. There is evidence tending to prove that he was requested by the appellant's employees to leave the platform and enter the car, and that he disregarded this request or order, and remained on the platform. The evidence also shows that there were from fifteen to twenty freight cars attached to the locomotive, and there was much evidence to the effect that, because of the slack between the cars, a freight train can not be started without a jerk. The appellant, in his testimony, says: "I knew freight trains did not go as smoothly as a passenger train. If there had been no slack, there would have been no jerk."

The court instructed the jury that unless the plaintiff proved that he was not guilty of contributory negligence there could be no recovery, but there were no instructions defining contributory negligence, for all the instructions upon this subject were expressed in general terms. One of the instructions given by the court reads thus: "Even if the jury find from the evidence that the plaintiff had been warned against standing on the platform, and had been directed to go inside, and had disobeyed the instruction, still, if the jury also believe from the evidence that the conductor of the train, at the moment of giving the signal to start, actually saw the plaintiff on the rear platform of the caboose in the act of entering, or attempting to enter the caboose, and knew that he was in a dangerous position, and without giving him a reasonable time to enter, and that by a sudden jerk in starting the cars the plaintiff was thrown to the ground and injured, then the jury should find for the plaintiff." This instruction can not be rescued from condemnation.

Leaving out of consideration minor matters of objection, and placing our decision upon broad grounds, we adjudge

The Louisville and Nashville Railroad Company v. Bisch.

that the instruction is so radically wrong as to compel a reversal of the judgment. The plaintiff, by refusing obedience to the directions given him, and by voluntarily remaining in a place of danger after warning, assumed the risk of injury. The case, as it appears on the hypothesis on which the instruction proceeds, is a stronger one than the ordinary case of contributory negligence, for the plaintiff did more than carelessly seek and remain in a place of danger, for he remained there in disobedience of directions given him, and despite the warnings which he received; he, in fact, assented to the injury. The case goes beyond the operation of the rule on the subject of contributory negligence, and comes within the scope of the maxim *volenti non fit injuria*. Around the central proposition that the plaintiff voluntarily assumed the risk by remaining in a place of danger in disobedience of directions and warnings, may be grouped various subsidiary doctrines which fortify and strengthen it.

A passenger is justified, as a general rule, in obeying the direction of the employees of the carrier, and if he receives injury in obeying them, the carrier is liable, even if it appears that if he had not obeyed he would have escaped injury. *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26, 29; *Louisville, etc., R. R. Co. v. Kelly*, 92 Ind. 371 (47 Am. Rep. 149); *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203; *Pool v. Chicago, etc., R. W. Co.*, 53 Wis. 657; *Hanson v. Mansfield R. W., etc., Co.*, 38 La. Ann. 111 (58 Am. Rep. 162); *Filer v. New York, etc., R. R. Co.*, 59 N. Y. 351; *St. Louis, etc., R. R. Co. v. Cantrell*, 37 Ark. 519 (40 Am. Rep. 105); *Fowler v. Baltimore, etc., R. R. Co.*, 18 West Va. 579; *Hickey v. Boston, etc., R. R. Co.*, 14 Allen, 429; *Railroad Co. v. Aspell*, 23 Pa. St. 147 (62 Am. Dec. 323); *Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S. 291; *Lake Shore, etc., R. R. Co. v. Brown*, 123 Ill. 162 (5 Am. St. Rep. 510). If the passenger may safely obey such directions, it must be for the reason that it is his duty to do so, and it

The Louisville and Nashville Railroad Company v. Bisch.

follows that if he refuses to do so he is guilty of a breach of duty. One who is himself guilty of a breach of duty, and wrongfully remains in a place of danger, can not recover if that wrong was the proximate cause of his injury, although another may have also been in fault. To authorize a recovery the case must be one "of unmixed negligence." This case strikingly illustrates this rule, for, had the plaintiff entered the car, as it was his duty to do, the injury would not have befallen him. Clearly, then, his own wrong was the proximate cause of his misfortune. *Sullivan v. Philadelphia, etc., R. R. Co.*, 30 Pa. St. 234.

Not only did the plaintiff, upon the theory on which the instruction is constructed, disobey a direction given him, but he remained in a place of danger where he ought not to have remained even if he had not been warned and directed to leave it. There are very many decisions which affirm that one who remains on the platform of a train about to move or which is in motion, although it is a regular passenger train, is, in the absence of explanatory circumstances, guilty of such negligence as will bar a recovery. *Secor v. Toledo, etc., R. R. Co.*, 10 Fed. Rep. 15; *Blodgett v. Bartlett*, 50 Ga. 553; *Camden, etc., R. R. Co. v. Hosey*, 99 Pa. St. 492; *Hickey v. Boston, etc., R. R. Co.*, 14 Allen, 429; *Willis v. Long Island, etc., R. R. Co.*, 34 N. Y. 670; *Smotherman v. St. Louis, etc., R. W. Co.*, 29 Mo. App. 265. But we do not decide whether these decisions declare the law correctly or not; it is sufficient for our purpose, and for this case, to affirm that a passenger who remains on the platform of a car at the rear end of a long train of freight cars, after warning to leave it, does voluntarily occupy a place of danger. We confine our decision to the case of one riding on a freight train, since that is all the case presented by the record requires. There is, it is our duty to say, a difference between freight trains and regular passenger trains. Passengers assume the risks incident to the means of transportation they adopt, and one who takes passage on a freight train, al-

The Louisville and Nashville Railroad Company v. Bisch.

though it has a caboose attached for the transportation of passengers, must take notice of the character of the train and use such ordinary care to avoid injury as the nature of the mode of transportation renders prudent. *Woolery v. Louisville, etc., R. W. Co.*, 107 Ind. 381; *Wallace v. Western, etc., R. R. Co.*, 98 N. C. 494 (2 Am. St. Rep. 346); *Harris v. Hannibal, etc., R. R. Co.*, 89 Mo. 233 (58 Am. Rep. 111); *Murch v. Concord, etc., R. R. Co.*, 29 N. H. 9 (61 Am. Dec. 631); *Galena, etc., R. R. Co. v. Fay*, 16 Ill. 558 (63 Am. Dec. 323). One of the risks which ordinary prudence requires a passenger on the caboose of a freight train to guard against is that arising from the sudden jerk of the train on starting resulting from the taking up of the slack between the cars. This is a matter of common knowledge of which an adult has no right to be ignorant, and with this knowledge he has no right to put himself in a position where it is probable that he will be thrown from the car when the train is put in motion. In this instance the plaintiff, having remained in such a position heedless of warning and in disobedience of instructions, has no cause of action. In assuming that upon the hypothetical case stated in the instruction, he might recover, notwithstanding his own wrong, a fatal error was committed.

Judgment reversed.

Filed Nov. 1, 1889.

Traders Insurance Company of Chicago v. Newman *et al.*

No. 13,883.

TRADERS INSURANCE COMPANY OF CHICAGO v. NEWMAN ET AL.

INSURANCE.—Husband and Wife.—Parties.—Complaint.—Wife's Interest in Policy.—Failure to Aver.—A complaint by a husband and wife, in a joint action on an insurance policy, issued to the husband alone, which fails to aver that the wife ever acquired any interest in the policy, is bad for a failure to state facts sufficient to constitute a cause of action.

SAME—Separate Real Estate of Wife.—Husband has no Insurable Interest in.—Sections 5116 and 5117, R. S. 1881, of the "Married Women's" Act, take away from the husband all right to the possession or control of the wife's separate estate. He has no present right of enjoyment, and no interest in the rents and profits of his wife's real estate. A policy of insurance secured thereon by the husband, who has no insurable interest therein, is unenforceable.

From the Huntington Circuit Court.

B. F. Ibach and J. G. Ibach, for appellant.

J. M. Hildebrand, J. C. Branyan, M. L. Spencer, W. A. Branyan, B. M. Cobb and C. W. Watkins, for appellees.

BERKSHIRE, J.—The appellees were the plaintiffs below, and brought this action on a fire policy issued by the appellant to the appellee, James M. Newman.

The complaint contains four paragraphs, each of which was demurred to separately, the demurrers overruled and exceptions taken.

Several paragraphs of answer were filed, to which, except the general denial, replies were filed, and the cause being at issue was submitted to a jury, who afterwards returned a special verdict. Upon the return of the verdict the appellant moved for judgment thereon, which motion was, by the court, overruled, and an exception taken.

The appellee, James M. Newman, then moved for judgment in his favor, which judgment was sustained by the

120	554
132	461

120	554
150	314

Traders Insurance Company of Chicago v. Newman *et al.*

court and judgment rendered accordingly. Thereupon the appellant filed a motion for a new trial, which motion was overruled and an exception reserved.

The appellant assigns several errors, but it does not become necessary for us to notice them in detail.

The several paragraphs of the complaint were bad, and the court erred in overruling the demurrers thereto. The appellee, Elvira J. Newman, was not a party to the policy; the appellant made no contract with her, or for her benefit; it did not agree to insure her against the loss of her property by fire; the obligation of the appellant was to the appellee, James M. Newman, and to him alone; it was to protect him against loss that the policy was executed; to him or to his assignee was the appellant liable in case of loss. The contract was personal; it was not an insurance of the property, but of the assured against loss because of its injury or destruction. *Wood Fire Ins.*, section 264; *May Ins.*, section 72; *Fogg v. Middlesex Mutual Fire Ins. Co.*, 10 Cush. 337. But this principle is elementary and need not be supported by the citation of authorities. The principles of interpretation applicable to contracts of insurance are the same as those which obtain in the case of other contracts. *May Ins.*, section 172. It was even beyond the power of the appellee James M. Newman to assign the policy until after he had suffered loss, either by the destruction of the property covered by it, or an injury thereto, without first obtaining the consent of the appellant to such assignment. *Wood Fire Ins.*, sections 264 and 361; *May Ins.*, section 377.

There is no averment in either paragraph of the complaint tending to show that the appellee Elvira J. Newman, ever acquired any interest in the policy, whereby she might in her own name, or jointly with her husband, maintain an action upon it; the averments in the complaint show to the contrary.

Notwithstanding the provisions of our code which allow a woman under coverture to maintain an action in her own

Traders Insurance Company of Chicago v. Newman *et al.*

name, when it becomes necessary to protect her separate estate, she may, as formerly, prosecute the action jointly with her husband. But it never was the rule to require or even to allow the husband to join his wife in an action where he alone held the right of action. Our code has emphasized the rule which prevailed at common law (although with numerous exceptions) by requiring that all actions, with a very few necessary exceptions, be brought in the name of the real party in interest. Section 251, R. S. 1881. It has become a well settled rule of law under our code, that where there is more than one party plaintiff, and the complaint upon its face shows a good cause of action in favor of some, but not in favor of all of the plaintiffs, it is bad; not because of a misjoinder of parties, but upon the ground that it fails to state facts sufficient to constitute a cause of action. *Neal v. State, ex rel.*, 49 Ind. 51; *Martin v. Davis*, 82 Ind. 38; *Kelley v. Adams, ante*, p. 340.

If John Smith or some other disinterested person had been joined with the appellee James M. Newman, as a party plaintiff, the sufficiency of the complaint would not have been contended for in the court below or insisted upon in this court; and yet if the complaint would have been bad with John Smith as a party plaintiff, it is equally so with Elvira J. Newman as such a party.

The cases of *Scotton v. Mann*, 89 Ind. 404, and *Wright v. Jordan*, 71 Ind. 1, cited by counsel for the appellee, are not cases in point. In the last cited case the question as to who were proper parties plaintiff was not before the court; the question ruled upon was one of liability, whether the party against whom the action was brought was liable to be sued upon the cause of action stated in the complaint. In the other case it appeared in the complaint that the wife was the meritorious party.

In the case under consideration the right of action, if any, was solely in the appellee, James M. Newman, and he alone should have brought the action.

Traders Insurance Company of Chicago v. Newman *et al.*

This leads us to the last question which we desire to consider. Did the court err in overruling the appellant's motion for judgment, and in rendering judgment for the appellee, James M. Newman, upon the special verdict returned by the jury? Our conclusion is that it did.

The facts as found show that the said appellee had no insurable interest in the property covered by the policy; no interest, legal or equitable, in the estate.

On the 30th day of June, 1873, one John Newman held the title to the land upon which the property destroyed was located, and together with his wife executed a conveyance, the granting part of which is in these words:

"Convey and warrant to James M. Newman and his heirs, of Huntington County, in the State of Indiana, for the sum of four hundred dollars, the following real estate (here follows the description), the said James M. Newman to hold said lands in trust for his heirs, with no right of conveyance without his heirs join in the deed. If the said James M. Newman dies without issue then said land falls back to my legal heirs."

The probability is that the "rule in *Shelley's Case*" controls the above conveyance, and that James M. Newman thereby became the fee simple owner of the real estate, but it is not necessary that we stop to consider that question.

Acting upon that idea, on the 13th day of December, 1883, the appellees conveyed the real estate to one James M. Hiltbrand in trust for the appellee Elvira, who, on the 17th of the same month, executed a warranty deed to her, and, upon the theory that she held the legal title, this action was commenced and prosecuted.

It has been held in Maryland, Pennsylvania, and some other of the sister States, that where the husband will become a tenant by curtesy in case he outlives his wife, he has an insurable interest in the estate.

This is upon the ground that he has a present right of en-

Traders Insurance Company of Chicago v. Newman *et al.*

joyment; is entitled to the rents and profits during the lifetime of his wife.

The following is a quotation from the case of the *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26 (79 Am. Dec. 673): "By the Act of 1842, chapter 293, section 1, any married woman was enabled to become 'seized of land by direct gift or purchase in her own name and as of her own property.' Under the deed, therefore, to Mrs. Deale, she was vested with the estate in fee: not, however, to her sole and separate use. In construing the Act of 1842, this court has said that, in such property, the husband retained his marital rights. * * * In this case, the appellee's rights were to a life estate, in right of his wife, with a right to the perennancy of the product and profits of the land during the coverture—and a contingent curtesy right in the event of his surviving his wife. * * * The question, then, presented for our decision is, whether such an interest in the property is sufficient to entitle the appellee to recover, upon the contract of insurance sued on in this case? Beyond all question the appellee had an insurable interest."

We take the following from the case of *Wright v. Wright*, 2 Md. 429 (56 Am. Dec. 723): "In volume 1, chapter 1, page 3, of Roper on Husband and Wife, it is said: 'By the intermarriage the husband acquires a freehold interest during the joint lives of himself and wife, in all such freehold property of inheritance as she was seized of at that time, or may become so during the coverture.' This is undoubtedly true, if the author is to be understood as meaning that he becomes so entitled in right of the wife so long as the coverture lasts; but if he is to be understood as asserting, that by virtue of the marriage alone he acquires a freehold estate in his own right for the joint lives of himself and wife, regardless of the cessation of the coverture, we do not concur with him, nor do the authorities upon which he relies sustain him." See, also, an extract copied in the opinion from Coke's Lit. *Harris v. Insurance Co.*, 50 Pa. St. 341; *Frank-*

 Traders Insurance Company of Chicago v. Newman *et al.*

lin, etc., Ins. Co. v. Drake, 2 B. Mon. 47; *Columbian Ins. Co. v. Lawrence*, 2 Peters, 23; *Abbott v. Hampden Mut., etc., Ins. Co.*, 30 Me. 414; *Montgomery v. Tate*, 12 Ind. 615. In this case it was held that the husband became entitled by the marriage to an estate in the lands of his wife during their joint lives, which was as absolute during that period as if acquired in any other mode, and that it was subject to sale on execution against him. *Butterfield v. Beall*, 3 Ind. 203; *Junction R. R. Co. v. Harris*, 9 Ind. 184.

In May on Insurance, the author, after stating that a husband, who in case he survives his wife, will become a tenant by curtesy, has an insurable interest, and referring to a number of authorities to support him, then makes the following statement: "Upon the same principles a tenant in dower may insure." No authority is referred to, nor have we been able to find one to support the author's conclusion. The principles are not the same; the wife merely has an estate in expectancy, who, in case she survives her husband, will be entitled to dower; she has no present right of enjoyment, nor is she entitled to the rents and profits. *Doe v. Brown*, 5 Blackf. 309.

In *Magee v. Young*, 40 Miss. 164 (90 Am. Dec. 322), it is said: "It is unquestionably true that the concurrence of marriage and seisin constitutes the foundation of the right of dower; but they do not of themselves vest the title in the wife. Park Dower, 7. They give rise to an inchoate right, which does not become complete until the death of the husband. 4 Kent Com. 50. And an inchoate right of dower is a mere possibility, and not an estate; 1 Hilliard Real Prop. 601, section 28; because it is liable at any time to be defeated by the death of the wife, the husband surviving. From the death of the husband, the incipient title, which existed in the wife during coverture, becomes consummated and perfected. Park Dower, 47; 1 Cruise Dig., tit. 6, section 1; and until that time it is not a vested estate, but a mere contingent interest or a chose in action. This right appears to be analogous to

Traders Insurance Company of Chicago v. Newman et al.

that of a husband to his wife's personal property and choses in action not reduced to possession by him during the coverture."

Until there is an actual admeasurement of dower it is a mere potential interest, amounting to nothing more than a mere chose in action, and is not subject to seizure and sale by execution at law. Before admeasurement of dower the wife has no interest or estate in the lands, and her deed operates not as a grant, but as an estoppel. *McCraney v. McCraney*, 5 Iowa, 232 (68 Am. Dec. 702); *Moore v. Mayor*, 4 Selden, 110 (59 Am. Dec. 473).

It will be observed, therefore, that every element upon which rests the rule giving to a husband holding an inchoate right of curtesy, an insurable interest in the property, is absent in the case of a wife who holds an inchoate right of dower. "This right, however, must be definite and fixed. A mere general interest, not susceptible of enforcement, which does not specifically apply, either in terms or by the operation of law, is not insurable, as the interest of a creditor under a debt or contract which has not been put in judgment; or *the interest of an heir, before the death of the owner* (the italics are our own), and other similar interests that do not exist, as certain definite or specific interests in the particular property. Thus, it will be seen that, in order to create an insurable interest two things must concur: A certain, definite or specific interest in the property, either by contract or operation of law, and such an interest that an injury to, or destruction of the property, would involve the person in immediate pecuniary loss, and the absence of either element, deprives the interest of its insurable character." *Wood Fire Ins.*, section 274.

In the case of *Agricultural Ins. Co. v. Montague*, 38 Mich. 548, COOLEY, J., delivering the opinion, the court says: "It is proper to say in this connection that under our statute, the husband has no control whatever over his wife's prop-

Traders Insurance Company of Chicago v. Newman *et al.*

erty; so that the question arises here precisely as it would had the silver been owned by a stranger."

We have the following statutes which control the question under consideration:

Section 5116, R. S. 1881, reads thus: "No lands of any married woman shall be liable for the debts of her husband; but such lands, and the profits therefrom, shall be her separate property, as fully as if she were unmarried: *Provided*, That such wife shall have no power to encumber or convey such lands, except by deed in which her husband shall join."

Section 5117 reads as follows: "A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange, and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance, or mortgage: *Provided, however*, That she shall be bound by an estoppel *in pais*, like any other person."

These statutes take away from the husband all right to the possession or control of the wife's separate estate. He has no present right of enjoyment, and no interest in the rents and profits of his wife's real estate. He has a mere right in expectancy, the same as the heir has in his ancestor's property. If a fire destroys the improvements he meets with no pecuniary loss any more than if the marriage relation did not exist between himself and the owner. *Montgomery v. Hickman*, 62 Ind. 598; *Crater v. Crater*, 118 Ind. 521, and cases cited.

Stropes v. The State.

If the assured possessed no insurable interest the policy can not be enforced. *Home Ins. Co. v. Duke*, 75 Ind. 535; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315; *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202.

The judgment is reversed, with costs, and the court below is instructed to sustain the demurrers to the different paragraphs of the complaint.

Filed Oct. 31, 1889.

No. 14,949.

STROPES v. THE STATE.

120 562
161 688
120 562
167 418

CRIMINAL LAW.—*Criminal Statute.*—*Construction of.*—*Indictment.*—*Legislative Intent.*—Where a criminal statute is not to receive a construction as broad as the language used would seem to warrant, but is to be narrowed by construction, contrary to the general rule an indictment drawn in the language of the statute is not sufficient. The indictment must be drawn so as to effectuate the intention of the Legislature by which it was framed.

SAME.—*County Officers.*—*Embezzlement.*—*Indictment.*—*Insufficiency of.*—*Failure to Charge a Felony.*—*Motion to Quash.*—So, where an indictment in the language of the statute (Acts of 1883, p. 106), making it a felony for the county officers therein named to fail to pay over to their successors on demand all moneys remaining in their hands, charges a county treasurer with having failed to pay to his successor the funds remaining in his hands, without an allegation that such failure was either felonious or unlawful, the indictment is defective as not charging the failure to be felonious, and a motion to quash should be sustained.

From the Greene Circuit Court.

W. W. Moffett, C. E. Davis, S. W. Artell, A. G. Cavins and *E. H. C. Cavins*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

Stropes v. The State.

COFFEY, J.—An act approved March 5th, 1883, Acts of 1883, p. 106, Elliott's Supplement, section 340, provides that it shall be the duty of each clerk, sheriff, and treasurer of the several counties in this State, and every other officer receiving money in his official capacity, at the expiration of his term of office, to pay over to his successor in office all moneys of every description, to whomsoever due, remaining in his hands at the expiration of such term, taking the receipt of such successor therefor; and any clerk, sheriff or treasurer so failing to pay over such moneys, or any successor, or clerk, sheriff or treasurer who shall fail to pay over any moneys to the parties entitled to receive the same, when called on so to do, shall be deemed guilty of embezzlement, and on conviction thereof shall be fined in any sum not exceeding one thousand dollars and be imprisoned at hard labor in the State prison not less than one nor more than five years.

Under the provisions of this statute, at the February term, 1889, of the Greene county Circuit Court, the grand jury of said county returned the following indictment against appellant, viz.:

"The grand jury of the county of Greene, in the State of Indiana, being duly impanelled, sworn and charged, upon their oaths, present that at said county of Greene, on the 4th day of November, 1884, one Edwin R. Stropes was then and there duly elected to the office of treasurer of Greene county, in the State of Indiana, for the term of two years ending on the 7th day of September, 1887; that the said Edwin R. Stropes was thereupon duly commissioned and afterwards, on the 7th day of September, 1885, gave bond, and on the 8th day of September, 1885, duly qualified and entered upon the duties of said office, and served as such treasurer until the 8th day of September, 1887; that on the 2d day of November, 1886, one James E. Bull was duly elected to the office of treasurer of said Greene county, in the State of Indiana, for the term and period of two years from said 7th day of September, 1887, and was afterwards

Stropes v. The State.

duly commissioned and gave bond, and on the 8th day of September, 1887, duly qualified and then and there entered upon the discharge of the duties of his said office as the successor of said Edwin R. Stropes, the then incumbent; that at the time of the surrender of said office to the said James E. Bull, to wit, on the 8th day of September, 1887, the said Edwin R. Stropes had in his hands, as such treasurer of Greene county, in the State of Indiana, the sum of fourteen thousand four hundred and fifty-nine dollars and forty-three cents (\$14,459.43), which moneys had come into his hands by virtue of his said office, and which sum was then and there due from the said Edwin R. Stropes, as treasurer aforesaid, to his successor in office, the said James E. Bull, as treasurer of Greene county, Indiana, as aforesaid; that immediately after the said James E. Bull had entered upon the discharge of his duties, as such treasurer of Greene county, in the State of Indiana, he demanded of the said Edwin R. Stropes the said fourteen thousand four hundred and fifty-nine dollars and forty-three cents (\$14,459.43), and demanded of him to pay over or account for all moneys which had come into his hands by virtue of the said office; that the said Edwin R. Stropes failed and refused and has ever since failed to pay over or account for the said fourteen thousand four hundred and fifty-nine dollars and forty-three cents (\$14,459.43), or any part of it, contrary," etc.

The court overruled a motion to quash the above indictment, and the appellant excepted, and thereupon entered a plea of not guilty.

A trial of the cause by a jury resulted in a verdict finding the appellant guilty as charged, and fixing his punishment.

Over a motion for a new trial judgment was rendered on the verdict, from which he appeals to this court.

The first supposed error relied upon by the appellant for the reversal of the judgment against him is, that the court erred in overruling his motion to quash the indictment.

Stropes v. The State.

It is earnestly contended by counsel for the appellant that the indictment before us is defective, in that it fails to aver that the acts therein charged were done either unlawfully, fraudulently, or feloniously.

On the other hand, it is contended by counsel for the State that the indictment falls within the general rule that it is sufficient in charging a purely statutory crime to follow the language of the statute creating such crime.

As to whether it is sufficient in a case under the statute for the violation of which the appellant stands charged to charge the defendant in the language of the statute alone, depends upon the construction to be placed upon that statute. If an outgoing clerk, sheriff, or treasurer is to be deemed guilty of a felony for failing to pay over to his successor in office the money remaining in his hands, without regard to the surrounding circumstances or particular facts in the case, then it must follow that a charge against him in the language of the statute is sufficient, for it is undoubtedly the general rule that where a crime is created by statute, defining the offence created, it is sufficient in an indictment to charge the offence in the language of the statute. *State v. Bougher*, 3 Blackf. 307; *Pelts v. State*, 3 Blackf. 28; *Marble v. State*, 13 Ind. 362; *Malone v. State*, 14 Ind. 219; *Stuckmyer v. State*, 29 Ind. 20; *Shinn v. State*, 68 Ind. 423; *State v. Allisbach*, 69 Ind. 50; *Howard v. State*, 87 Ind. 68; *Toops v. State*, 92 Ind. 13; *State v. Miller*, 98 Ind. 70; *State v. Berdetta*, 73 Ind. 185; *Skinner v. State*, 120 Ind. 127.

But this general rule, like most others, has its exceptions. One of the well known exceptions is that where the terms of the statute are broader than the intent of the Legislature, the indictment must be so drawn as to effectuate the intention of the Legislature by which it was framed. *State v. Turnbull*, 78 Maine, 392; *Commonwealth v. Slack*, 19 Pick. 304; *State v. Griffin*, 89 Mo. 49; Moore Crim. Law, section 171; *Bates v. State*, 31 Ind. 72; Gillett Crim. Law, section

Stropes v. The State.

132; *Schmidt v. State*, 78 Ind. 41; *State v. Welch*, 88 Ind. 308; *Bowles v. State*, 13 Ind. 427.

In the case of *State v. Welch*, *supra*, it was said by this court: "It is a general rule, also, that it is sufficient to charge the offence in the language of the statute defining it; but to this rule there are exceptions. One of these is where the statute is not to be taken in the broad meaning of the words used, but limited by construction to a special subject or matter, in which case the indictment should charge the crime so as to bring it within the construction placed upon the act." To the same effect are the cases of *Bowles v. State*, *supra*, and *Bates v. State*, *supra*.

The case of *Schmidt v. State*, *supra*, was a prosecution against the defendant for having in his possession, with intent to sell the same, diseased meat in violation of the provision of section 2070, R. S. 1881. This court, in commenting upon that statute and the information in that case, said: "The construction we place upon the statute is narrower than the general words. By construction, we limit the operation of the general words to cases where the accused had knowledge of the quality of the article, and where the sale made, or intended, was for food. In such cases it is not sufficient to charge the offence in the language of the statute."

It will thus be seen that where a criminal statute is not to receive a construction as broad as the language used would seem to warrant, but is to be narrowed by construction, an indictment drawn in the language of the statute will not be sufficient. In the light of this rule, we proceed to an examination of the statute now before us with a view of ascertaining the intent of the Legislature in its enactment. It is well known that it is the duty of a public officer charged with the receipt and disbursement of public funds to preserve such funds for the uses for which they were intended. Notwithstanding such known duty it frequently occurred that such officers, while in office, appropriated and converted the funds entrusted to them to their own use, which fact could

Stropes v. The State.

not well be known until a successor was elected and qualified and they were called upon to account, and until a criminal prosecution for such conversion was barred by the statute of limitations.

In contemplation of law, all moneys received by a public officer and not legally disbursed remain in his hands. Doubtless he could not be heard, when called upon by his successor for the funds remaining in his hands, to give as an excuse for not paying the same over that he had wrongfully converted the same to his own use. To permit him to excuse himself under such a plea would be to allow him to take advantage of his own wrong, a thing the law never tolerates. For a failure to account to his successor for funds thus wrongfully converted to his own use, we think he would clearly be liable to prosecution and punishment under the statute we are now considering. Again, at the time his successor is elected and qualified, he may have funds in his actual possession which he withholds with a view of appropriating the same to his own use and thus depriving the rightful owner of such funds. In that and, in perhaps, other cases he would be liable to prosecution under this statute. But if the funds which came into his hands were destroyed by the act of God, or if the safe in which he should place them should be robbed and the money stolen without his fault, or if he should deposit the same in a bank of good repute for solvency and they should be lost without his fault, or if in the disbursement of the funds he should make an honest mistake and pay out more than he should have paid, we do not think he would be liable to a criminal prosecution under this statute; and yet by the terms of the statute he would be liable. It is evident, therefore, that this statute is not to be construed in as broad a sense as its language would imply, and an indictment simply following its language is bad. We think that the indictment should have charged that the failure of the appellant to pay over to his successor in office the moneys remaining in his hands was felonious.

Stewart et al. v. Babbs et al.

It is not even charged that it was unlawful. For a failure to charge that the appellant feloniously failed to pay over to his successor in office the money remaining in his hands the indictment before us is defective and should have been quashed.

Judgment reversed, with instruction to the circuit court to quash the indictment.

The clerk will give the usual notice to return the prisoner to the sheriff of Greene county.

Filed Nov. 2, 1889.

120	568
128	22
129	473
120	568
131	193
120	568
136	382

120	568
150	585
120	568
155	626

No. 13,783.

STEWART ET AL. v. BABBS ET AL.

MARRIED WOMAN.—*Husband and Wife.*—*Estate by Entireties.*—*Void Mortgage.*—*Contract of Suretyship.*—Where husband and wife hold an estate by entireties through a conveyance made to them jointly, his note being accepted for the purchase-money, the debt is his, not hers, and a mortgage to secure the note executed by both is, under section 5119, R. S. 1881, void as against the wife.

SAME.—*Mortgage.*—*Oral Negotiations and Stipulations.*—*Merger of.*—In an action to foreclose said mortgage, neither fraud nor mistake being alleged, all oral negotiations and stipulations are merged in the contract as reduced to writing in the execution of the deed, note, and mortgage.

ACTION.—*Parties to.*—*Husband and Wife.*—*Joint Assignment of Errors by.*—Where husband and wife are parties to an action they may join in an assignment of error as to rulings which affect the wife alone, the rule in 110 Ind. 131, not being applicable to husband and wife.

From the Switzerland Circuit Court.

F. M. Griffith, W. R. Johnston, J. A. Van Osdol, J. A. Works and L. O. Schroeder, for appellants.

J. B. Coles, for appellees.

Stewart et al. v. Babbs et al.

BERKSHIRE, J.—The facts of this case are about as follows:

On the 6th day of February, 1883, the appellant Samuel Stewart executed to the appellee Alice M. Summers his several promissory notes, as follows:

For \$300	Due March 1st, 1884.
For \$300	Due March 1st, 1885.
For \$400	Due March 1st, 1886.
For \$500	Due March 1st, 1887.
For \$500	Due March 1st, 1889.
For \$500	Due March 1st, 1891.
For \$500	Due March 1st, 1893.

And the appellants executed a mortgage upon the land therein described to secure the payment of said notes. The note falling due March 1st, 1886, was assigned by endorsement to the appellee Noah Babbs, and the one falling due March 1st, 1887, was assigned by endorsement to the appellee Caroline Moore, and the remainder of said notes was held by the payee, the appellee Alice M. Summers, at the commencement of this action, and at the time final judgment was rendered in the court below.

The appellee Noah Babbs brought this action upon the note so endorsed to him, and to foreclose the mortgage, making his co-appellees and the appellants defendants thereto.

The appellee Charles L. Summers has no interest in the subject-matter in controversy, but was made a party for the reason that he was the husband of the appellee Alice M. Summers.

The appellee Caroline Moore filed a cross-complaint upon the note held by her, and to foreclose the mortgage.

The appellee Alice M. Summers (her husband joining therein), filed a cross-complaint upon all of said notes except the two notes which had been endorsed, and to foreclose the mortgage.

To the complaint and cross-complaints Mrs. Stewart filed an answer.

The first paragraph was a general denial.

In the second paragraph she alleged coverture at the date of the execution of the mortgage; that she was the owner in her own right of the undivided one-half of the mortgaged land, and held title thereto, and that the mortgage was executed to secure the debt of her husband.

The appellant Samuel Stewart filed an answer also, but as it does not cut any figure in this appeal we need not notice it again.

Mrs. Stewart also filed a cross-complaint, alleging ownership to the undivided one-half of the mortgaged land, in which she averred that the appellees were asserting that they held a lien thereon by virtue of said mortgage, and demanded that her title be quieted.

To the cross-complaint of Mrs. Stewart the appellees filed an answer, and to the second paragraph of her answer to their complaint and cross-complaint they filed a reply.

The facts averred in the second paragraph of the reply are similar to those pleaded in the answer of the appellees to the cross-complaint of Mrs. Stewart, and present the same question.

The facts, briefly stated, are these: Mrs. Stewart and Mrs. Summers were sisters, and the owners jointly of the land described in the mortgage, and an additional tract adjoining of seventy acres, encumbered with a life-estate, which their mother, Nancy Maples, held therein. It was agreed among the three that Mrs. Stewart and Mrs. Summers would join in a conveyance, conveying the fee in the seventy-acre tract to Mrs. Maples, and in consideration therefor she would convey her life-estate in the mortgaged land to her daughters. At the same time it was agreed between the sisters that Mrs. Summers would convey her interest in the mortgaged land to Mrs. Stewart for \$3,000, and that pursuant to these oral agreements, Mrs. Summers and her husband, together with Mrs. Maples, joined in a conveyance conveying the mortgaged land to Mrs. Stewart and her husband jointly, and

that the two sisters and their husbands joined in a conveyance conveying the seventy-acre tract to Mrs. Maples; that the conveyance to Mrs. Stewart and her husband was made to them jointly by her direction, and in consideration therefor the notes in suit were executed, together with the mortgage; that, on the same occasion, and immediately preceding the execution of the notes, something was said about Mrs. Stewart joining in the notes, but the notary public who was preparing the instruments, remarked that it was unnecessary for her to do so, as the notes represented the purchase-money for the undivided one-half of the land conveyed by Mrs. Summers, and that it would only be necessary for her to sign the mortgage, and hence she did not sign the notes.

To the answer to her cross-complaint, and to the reply to her said answer, Mrs. Stewart filed separate demurrers, which the court overruled, and she excepted.

She then filed a reply in general denial to the said answer to her cross-complaint, and the cause being at issue was submitted to the court for trial, without the intervention of a jury.

The finding of the court was for the appellees on all the issues joined.

After the court announced its finding the appellants filed their separate motions for a new trial, which were by the court overruled, and they excepted.

The court then rendered judgment upon its finding, and there was a decree for the sale of the real estate. A motion was then made by Mrs. Stewart to modify the judgment and decree, but in view of our conclusion the ruling of the court upon this motion is unimportant.

Neither fraud nor mistake is charged in the original pleadings of the appellees, nor in their answer to the cross-complaint of Mrs. Stewart, nor in their reply to Mrs. Stewart's answer of suretyship.

It is well settled, by a long line of decisions of this court, that when the parties reduce their contract to writing, all

Stewart et al. v. Babbs et al.

oral negotiations and stipulations are merged therein, and the writing must be treated as containing the whole contract. *Carr v. Hays*, 110 Ind. 408; *Brown v. Russell*, 105 Ind. 46; *Phillbrook v. Emswiler*, 92 Ind. 590; *Clodfelter v. Hulett*, 72 Ind. 137; *Walterhouse v. Garrard*, 70 Ind. 400; *McDonald v. Elfes*, 61 Ind. 279; *Mahan v. Sherman*, 7 Blackf. 378; *Harvey v. Laflin*, 2 Ind. 477; *Burns v. Jenkins*, 8 Ind. 417; *Madison, etc., Co. v. Stevens*, 10 Ind. 1; *Potter v. Earnest*, 45 Ind. 416.

When the deeds, mortgage, and notes were executed by the parties, the contract, as ultimately agreed upon, was to be found only in the writing, all precedent negotiations and stipulations being merged therein.

We, therefore, in arriving at a conclusion, have disregarded all oral understandings and conversations averred as leading up to the written contract.

Mrs. Stewart paid the consideration to her mother for the release of the life-estate on her undivided interest in the mortgaged land, and Mrs. Summers did likewise. The two then held the mortgaged land, relieved of the life-estate, and the conveyance from Mrs. Summers and her husband, and Mrs. Maples, conveyed to Mrs. Stewart and her husband Mrs. Summers' interest in the mortgaged land, and it was for this interest that the notes sued on were executed..

The following statute was in force when the transactions in question occurred. Section 5119, R. S. 1881: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner; and such contract, as to her, shall be void."

This statute has at all times been construed liberally in favor of the wife, and it has in many cases been held by this court that a mortgage on the wife's real estate to secure the husband's debt is within the statute. *Allen v. Davis*, 99 Ind. 216; *Vogel v. Leichner*, 102 Ind. 55; *Warey v. Forst*, 102 Ind. 205; *Allen v. Davis*, 101 Ind. 187; *Brown v. Will*, 103

Stewart et al. v. Babbs et al.

Ind. 71; *Cupp v. Campbell*, 103 Ind. 213; *Engler v. Acker*, 106 Ind. 223; *Crooks v. Kennett*, 111 Ind. 347.

Under the contract as finally executed, Mrs. Stewart and her husband held title to the undivided interest conveyed by Mrs. Summers and her husband, and Mrs. Summers held the individual obligations of Samuel Stewart for the purchase-money. The separate estate of Mrs. Stewart was not increased or benefited by the transaction. She and her husband held the estate by entires, and his obligations having been accepted for the purchase-money, the conclusion necessarily follows that the debt was his and not hers. What the result would have been had she joined in the notes is a question not before us. We cite the following cases as upholding our conclusions: *Dodge v. Kinzy*, 101 Ind. 102; *State, ex rel., v. Kennett*, 114 Ind. 160; *Crooks v. Kennett, supra*; *McCormick, etc., Co. v. Scovell*, 111 Ind. 551. In *Jones v. Ewing*, 107 Ind. 313, it was held that where the appellants, husband and wife, purchased a piece of town property jointly, the wife purchasing an interest equal to $\frac{1}{17}$ and the husband the remainder, or $\frac{16}{17}$, and by agreement the conveyance for the whole property was executed to the wife, she paying for her $\frac{1}{17}$ in cash, and the husband and wife executing notes for the $\frac{16}{17}$ purchased by the husband, and a mortgage on the property executed by both to secure the notes, the wife was but the surety of her husband, and that the mortgage was void as to the $\frac{1}{17}$ paid for by her.

In our opinion the court erred in overruling the demurrers to the answer of the appellees to Mrs. Stewart's cross-complaint, and to the second paragraph of their reply to the second paragraph of her answer to their complaint and cross-complaint.

We do not wish to be understood as holding that the consideration for an obligation or contract is not open to explanation by parol evidence, nor that the person to whom the consideration moves may not by the same character of

Stewart et al. v. Babbs et al.

evidence be identified. The contrary of this is well, and has long been, settled by the decisions of this court.

The case cited last above, and the case of *Jouchert v. Johnson*, 108 Ind. 436, fully recognize this rule in cases of the class of the one under consideration. But the writings which the parties executed in the case under consideration disclose the consideration for the notes sued upon and to whom it moved. The averments as to what was said and agreed upon in advance of the writings, executed by the parties, did not tend to show a different consideration, or that it moved in a different direction than as disclosed by the written contract, and were, therefore, merged in the written contract.

The point is made that the appellants have assigned joint errors, and that the questions presented relate to rulings of which Mrs. Stewart alone has the right to complain, and the case of *Orton v. Tilden*, 110 Ind. 131, is cited. We do not regard the rule as applicable to husband and wife. We can imagine no good reason why the husband may not join with the wife in the assignment of error in this court, and no reason that would not be equally applicable to his joining with her in an action which she may maintain in the circuit court without joining her husband.

The judgment is reversed, with costs, and the court below is instructed to proceed in accordance with this opinion.

Filed Nov. 2, 1889.

The State, *ex rel.* Corwin, *v.* The Indiana and Ohio Oil, Gas, and Mining Co.

No. 14,928.

THE STATE, EX REL. CORWIN, *v.* THE INDIANA AND OHIO
OIL, GAS, AND MINING COMPANY.

NATURAL GAS.—*Transportation of.*—*Interstate Commerce.*—*Constitutional and Unconstitutional Provisions.*—*Interblending of.*—The act of March 9th, 1889, Acts of 1889, p. 369, has for its object to prevent persons from conveying natural gas from this state into another state, with the imposition of penalties for so doing, and is unconstitutional, being legislation in reference to interstate commerce. The provision of the act as to the sinking of wells, is so bound up with the provisions designed to effect the principal object that separation can not be made, without completely destroying the statute, and substituting another for it by judicial construction.

SAME.—*Commercial Commodity.*—*When it Becomes.*—Natural gas in the earth may not be a commercial commodity, but when brought to the surface and placed in pipes for transportation, it assumes that character as completely as coal on the cars, or petroleum in the tanks.

CONSTITUTIONAL LAW.—*Interstate Commerce.*—*Commercial Commodities.*—*Transportation of Between States.*—Transportation of commercial commodities from state to state is interstate commerce, and the state legislature can neither burden nor restrict it.

SAME.—*Foreign Corporations.*—*Legislative Power over.*—*Limit of.*—While the legislature may regulate or restrict the business of foreign corporations within the state, it can not do so where it operates upon interstate commerce.

SAME.—*Rights of Property.*—*Legislative Control of.*—It is not in the power of the legislature to prevent one person from buying, or another from selling property. The rights of property are not subject to such absolute legislative control. This is the general rule, and it applies to such property as natural gas, petroleum, and coal.

SAME.—*Police Power.*—*Exercise of by the State.*—The states may, so long as they do no more than legitimately exercise the police power, legislate upon matters connected with interstate commerce. The act under consideration, however, can not be deemed a legitimate exercise of the police power of the state. It does not assume to provide for the safety, health, or comfort of the citizens of the state.

SAME.—*Provisions of a Statute.*—*Separation of.*—*When can not be Made.*—When the provisions of a statute are so closely blended that a separation can

120	575
120	600
123	875
120	575
124	581
120	575
128	564
128	596
120	575
131	290
120	575
147	628
120	575
155	548

The State, *ex rel.* Corwin, *v.* The Indiana and Ohio Oil, Gas, and Mining Co.

not be effected without substituting another law for that intended to be enacted, none can be made by the courts.

From the Jay Circuit Court.

L. T. Michener, Attorney General, *J. M. Smith*, *W. E. Niblack*, *J. C. Nelson*, *Q. A. Myers*, *L. Walker*, *J. R. Coffroth* and *C. B. Stuart*, for appellant.

J. B. Cohrs, *R. C. Bell* and *S. R. Morris*, for appellee.

ELLIOTT, C. J.—At the last session of the General Assembly several acts were passed upon the subject of mining, using, and disposing of natural gas. The validity of one of these acts, that of March 9th, 1889, is assailed, upon the ground that it contravenes the provisions of the Federal Constitution. The first section of the act, which is here the direct subject of controversy, reads thus :

“SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That it shall be unlawful for any person or persons, company, corporation, or voluntary association to pipe or conduct natural gas from any point within this State to any point or place without this State ; any person or persons, company, corporation, or voluntary association, now or hereafter incorporated under any law of this or any other State, for the purpose of drilling and mining for petroleum or natural gas, or otherwise acquiring gas or petroleum wells and the products thereof, and to furnish the same to its patrons, or to convert such product into gas for illuminating purposes or fuel, which shall have entered upon and acquired by deed of conveyance or appropriated or condemned any real estate under any law of this State, for the purpose of laying its pipe lines or for any other purpose, which shall permit any gas to be conveyed or carried through its pipes to any place without this State, or for the purpose of being used without this State, shall forfeit all right, title and interest in and to all such real estate so appropriated, conveyed or condemned, and the pipes laid thereunder, and the same shall revert to and become the property of the persons or corpora-

The State, ex rel. Corwin, v. The Indiana and Ohio Oil, Gas, and Mining Co.

tion, their heirs, successors or assigns, who owned the same at the time of such appropriation, conveyance or condemnation: *Provided*, That the provisions of this act shall not be so construed as to prevent towns or cities divided by any of the boundary lines of the State, and having a majority of the population of such cities or towns residing within this State, from being supplied with natural gas." Elliott's Suppl., section 1785.

On the 23d of February, 1889, an act was passed declaring that the word "mining" shall be deemed to include the sinking of gas wells, and that the incorporation of companies and the subscription of stock under former laws are legalized. Acts of 1889, p. 38. On the 21st day of February, 1883, an act was passed authorizing gas companies to extend their pipes beyond the corporate limits of towns and cities. Acts of 1883, p. 17. On the 20th day of February, 1889, the General Assembly passed an act authorizing natural gas companies to appropriate and condemn property. Acts of 1889, p. 22. Elliott's Suppl., sections 1009, 1014, 1016. All of these acts were put in immediate effect by the proper emergency clause.

The appellee's counsel contend that the act of March 9th, 1889, is invalid, because it is interstate commerce legislation, and such legislation must be exclusively Federal.

In order to give any force to this contention it is necessary to determine, at the outset, whether natural gas can be considered an article of commerce. With this preliminary question we have but little difficulty. Natural gas is as much an article of commerce as iron ore, coal, petroleum, or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country. *Citizens', etc., Co. v. Town of Elwood*, 114 Ind. 332; *Carother's Appeal*, 118 Pa. St. 468; *Columbia Conduit Co. v. Commonwealth*, 90 Pa. St. 307; *West Virginia, etc., Co. v. Volcanic Co.*, 5 West Va. 382; *The*

The State, ex rel. Corwin, v. The Indiana and Ohio Oil, Gas, and Mining Co.

Daniel Ball, 10 Wall, 557; *Kidd v. Pearson*, 128 U. S. 1.

The gas in the earth may not be a commercial commodity, but, when brought to the surface and placed in pipes for transportation, it must assume that character as completely as coal on the cars or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another state, and there is no difference in principle between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or manufactured product is not an article of commerce, but, when it assumes such a form as fits it for transportation from state to state, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity. For the purposes of taxation an article of property may not be regarded as a commercial commodity until it has started on its way from one state to another, but property that may become an article of commerce can not be kept in the state where it was produced by a state law forbidding its transportation. *Coe v. Errol*, 116 U. S. 517. If this were not so, then, not only might coal and petroleum be kept within the state in which they were produced, but so might corn and wheat, cotton and fruit, and lead and iron. If such laws could be enacted and enforced, a complete annihilation of interstate commerce might result, and it was to prevent the possibility of such a result that the provision vesting exclusive power in the Federal government was written in the National Constitution. *State, ex rel., v. Woodruff Sleeping Coach Co.*, 114 Ind. 155.

The question as to the extent of the power of the State to control the business of mining is not necessarily involved in this controversy. Granting, but not asserting, that procuring natural gas from the earth is mining, still the question of the power of the State over that business is not so involved as to require our judgment upon it. The provisions of the statute are so firmly interlocked that separation is impossi-

The State, ex rel. Corwin, v. The Indiana and Ohio Oil, Gas, and Mining Co.

ble. Where the provisions of a statute are so closely blended that a separation can not be effected without substituting another law for that intended to be enacted, none can be made by the courts. *Griffin v. State, ex rel.*, 119 Ind. 520. To authorize the courts to reject part and sustain part of a statute "the parts must be capable of separation, so that each may be read by itself;" limitation, by construction, is not separation. *Baldwin v. Franks*, 120 U. S. 678; *Virginia Coupon Cases*, 114 U. S. 269; *Trade-Mark Cases*, 100 U. S. 82; *United States v. Reese*, 92 U. S. 214. In this instance there is no attempt to regulate the business of mining except in so far as that business may be connected with transporting natural gas out of the state. The principal object—and, indeed, it is not too much to say, the sole object of the statute—is to prevent persons from conveying gas into another state, and the provisions of the act as to the sinking of wells is so bound up with the provisions designed to effect the principal object that separation can not be made without completely destroying the statute and substituting another for it by judicial construction.

The power to regulate commerce between the states is exclusively in the Federal Congress. Inaction by Congress will not authorize the States to legislate in matters of interstate commerce. Whatever doubt the earlier decisions may have created—and certainly there was, for a time, much confusion and conflict—it is completely removed by the recent decisions, and the law now is, that all legislation in regulation of commerce between the states must be enacted by the national legislature.

Transportation of commercial commodities from state to state is interstate commerce, and the state legislatures can neither burden nor restrict it. *Henderson v. Mayor*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Railroad Co. v. Husen*, 95 U. S. 465; *Robbins v. Shelby Co. Taxing District*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502; *Western*,

The State, ex rel. Corwin, v. The Indiana and Ohio Oil, Gas, and Mining Co.

Union Tel. Co. v. Massachusetts, 125 U. S. 530 ; *State, ex rel., v. Woodruff Sleeping Coach Co.*, *supra*.

The power of the Federal Congress over all matters of interstate commerce, broad as the modern decisions declare it to be, does not absolutely exclude state legislation touching commerce between the states. Police power not delegated to the general government resides in the states as an inherent attribute of sovereignty. *U. S. v. DeWitt*, 9 Wall. 41 ; *Slaughter-House Cases*, 16 Wall. 36 ; *U. S. v. Reese*, *supra* ; *Sherlock v. Alling*, 93 U. S. 99 ; *Patterson v. Kentucky*, 97 U. S. 501 ; *Civil Rights Cases*, 109 U. S. 3 ; *Smith v. Alabama*, 124 U. S. 465 ; *Nashville, etc., R. W. Co. v. Alabama*, 128 U. S. 96.

The states may, so long as they do no more than legitimately exercise the police power, legislate upon matters connected with interstate commerce. *Sherlock v. Alling*, *supra* ; *County of Mobile v. Kimball*, 102 U. S. 691 ; *Smith v. Alabama*, *supra* ; *Nashville, etc., R. W. Co. v. Alabama*, *supra*.

It is almost impossible, however, in view of the conflicting and confused state of the law as declared by the Federal Supreme Court, to determine what that tribunal, with which rests the ultimate decision of the question, will eventually regard as a legitimate exercise of the police power by the states, since the doctrine declared in the case of *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, is much more restrictive of the rights of the states than that asserted in *Smith v. Alabama*, *supra* ; *Nashville, etc., R. W. Co. v. Alabama*, *supra* ; *Munn v. State*, 94 U. S. 113, and many earlier cases. But it is evident that the act under examination can not, under the rule laid down by the court of last resort, be deemed a legitimate exercise of the police power. The act does not assume to provide for the safety, health, or comfort of the citizens, but its object is to prevent the sinking of gas wells and the laying of pipe lines by persons who desire to convey gas out of the State. It is not a regulation of the mode of procuring, transporting, or using natural gas designed to

The State, ex rel. Corwin, v. The Indiana and Ohio Oil, Gas, and Mining Co.

secure the health, safety, or comfort of the citizens of Indiana. Neither in the title nor in the body of the act is it professed to be the legislative purpose to regulate the mode of procuring, transporting, or using natural gas. From beginning to end the purpose is plainly and unmistakably manifested, and that purpose is to prohibit the transportation of natural gas beyond the limits of the State. The act is, in effect, as it is in words, a legislative prohibition directed solely against a designated class of persons. It is not the mode of transportation against which the prohibition is directed, but the persons who engage in the business. Plainly—too plainly for denial—the object of the statute is to keep natural gas within our borders. Its object is not to protect our citizens from injury from the mode of procuring and transporting gas adopted by those who engage in the business of procuring or transporting it. The act can not be taken out of the operation of the Federal decisions upon the theory that it is a valid exercise of the police power resident in every sovereign state, for the theory is without foundation.

The right of eminent domain resides in every state as one of the great elements of sovereignty. It was at one time held by the Supreme Court of the United States that the general government could not exercise the right within the territorial limits of a state. *Pollard v. Hagan*, 3 How. 212 (223). But this doctrine was denied in *Kohl v. United States*, 1 Otto, 367. Whether the right of a State is, or is not, exclusive, or how far that of the general government extends, is, however, not material here, for there can be no doubt that the right dwells in the state. But whether the state can, by the exercise of this right, or by the denial of it, interfere with interstate commerce is a question of no little difficulty and importance. Happily we are spared the delicate and difficult task of determining whether a state can delegate the right of eminent domain to persons who confine their business exclusively within the territorial limits of the state,

The State, ex rel. Corwin, v. The Indiana and Ohio Oil, Gas, and Mining Co.

and deny it to those engaged in a business extending from state to state. The language of the act forbids the conclusion which counsel seek to establish, that the legislature meant to do no more than deny the right of eminent domain to persons desiring to transport natural gas from Indiana. The language of the section we have quoted leaves no room for construction, for, beyond controversy, its meaning is that no person shall be permitted to transport natural gas to another state. But if there were doubt, it is entirely banished by other parts of the act. In the title is written: "An act to prohibit any person, firm, corporation, company or voluntary association, organized under the laws of this State or any other State, from piping or otherwise conveying from any point or points in this state to any point or points without the State of Indiana any natural gas or petroleum." The third section of the act prescribes a penalty for a violation of its provisions, and the provisions of this section apply to persons who acquire rights by purchase as well as those who secure rights by condemnation. The provisions of the act are, therefore, firmly interlaced. There is a complete and indivisible unity. The unification is so thorough that no separation can be effected, and nothing remains but to read the act as an entirety and as it is written. Taking the act as it is written, the only possible conclusion is that it was meant to prohibit the transportation of natural gas from the State by any person, natural or artificial, no matter whether the right to the gas and its transportation is acquired by contract or by condemnation.

We are not unmindful of the rule that statutes upon the same subject should be construed together, and we have given all the statutes relating to natural gas careful study. The only conclusion which can be maintained, as our investigation has convinced us, is, that the act under immediate mention is not affected by any of the other acts, for it is complete in itself, and has a clearly defined purpose, and that purpose is to prohibit gas from being transported out of the state.

The State, *ex rel.* Corwin, v. The Indiana and Ohio Oil, Gas, and Mining Co.

It is not possible to sustain the act, as counsel endeavor to do, upon the principle that the state may impose restrictions on foreign corporations. We have more than once enforced the rule that the Legislature may regulate or restrict the business of foreign corporations within this state. *Phenix Ins. Co. v. Burdett*, 112 Ind. 204; *Insurance Co. v. Brim*, 111 Ind. 281; *State, ex rel., v. Insurance Co.*, 115 Ind. 257; *Blackmer v. Royal Ins. Co.*, 115 Ind. 291. But we have not adjudged that the rule can be applied where it operates upon matters of interstate commerce, nor can we do so without coming in direct conflict with the law as declared by the court invested with exclusive appellate jurisdiction of such questions. The decisions of that court utterly demolish the theory of counsel that under the power to restrict foreign corporations, may be placed the right to legislate in matters respecting the commerce between the states. Those decisions are absolutely conclusive.

There may be, and doubtless there are, objections to the act not argued by counsel nor discussed by us. One objection occurs to us which we believe it proper to notice. That objection is this: It is not in the power of the Legislature to prevent one citizen from buying or another from selling property. The rights of property are not subject to such absolute legislative control. It is unnecessary to determine to what limitations the general rule we have stated is subject, for it is enough to assert the general rule, and affirm that it applies to such property as natural gas, petroleum, and coal.

We can find no tenable ground upon which the act can be sustained, and we are compelled to adjudge it invalid.

Judgment affirmed.

Filed Nov. 6, 1889.

Pickett v. Green et al.

190	584
194	36
190	584
128	537
120	584
141	59
120	584
150	370
120	584
157	506

No. 14,940.

PICKETT v. GREEN ET AL.

CONTRACT.—*Agreement in Restraint of Trade.*—*Consideration.*—*Parol Testimony to Add to.*—*When Inadmissible.*—*Contractual Stipulation.*—*Injunction.*—Where, by the terms of a written contract, a physician, in consideration of the agreements and averments therein set forth, sold his office furniture and good-will, and agreed not to practice medicine within specified territorial limits for a definite time, the contract is complete and the stipulation as to the consideration is contractual. In a proceeding to enjoin the physician from practicing, by the terms of the contract, he will not be permitted to show by parol testimony that in addition to the consideration named, and the real consideration for his refraining from practice, was the agreement of one of the plaintiffs to purchase from him a certain piece of real estate, which he failed to do.

SAME.—*Conditional Delivery.*—*Escrow.*—*Injunction Proceeding.*—*Pleading.*—*Answer.*—An averment in an answer to the complaint in the injunction proceeding that the delivery of the contract sued on was conditional, does not show the non-execution of the contract, such a contract being incapable of delivery to one of the parties as an escrow.

SAME.—*Breach of.*—*When Cause for Injunction.*—*Defendant's Insolvency.*—A finding by the court that a breach of contract has caused, and is likely to cause, the plaintiffs damage, the defendant being insolvent, makes a case for injunctive relief, the plaintiffs having no other remedy. *Thayer v. Younge*, 86 Ind. 259, distinguished.

From the Noble Circuit Court.

L. W. Welker, R. P. Barr and R. W. McBride, for appellant.

L. H. Wrigley, S. J. Peelle, W. L. Taylor and H. G. Zimmerman, for appellees.

COFFEY, J.—It is averred in the complaint in this cause that on the 6th day of June, 1885, the appellant and the appellees entered into the following written agreement, viz.:

“This agreement made and entered into by and between Columbus M. Pickett, party of the first part, of the county of Noble and State of Indiana, and Thomas C. Green and

Pickett v. Green *et al.*

William T. Green, of said State, parties of the second part, witnesseth : That said party of the first part in consideration of the agreements and covenants of the parties of the second part hereinafter set out, said first party hereby sells and conveys to said second parties the following personal property, to wit : 1 table, 1 office chair with book rest, 1 reclining-chair with cane bottom and back, 6 common chairs, 1 prescription case, 1 book case, 1 stove with pipe, 1 side-lamp, 1 oil can, 1 slate, and his good-will in the practice of medicine ; and further agrees not to locate for the practice of medicine within a radius of ten miles of said town of Albion for fifteen years from this date, nor to practice within said radius, but reserves the right to do some practice for two weeks from this date.

“ For, and in consideration of which, said second parties hereby agree to this day give said first party their note for one hundred dollars, due in ten days from date, and within said date to pay the same to said first party or order.

(Signed): “ COLUMBUS M. PICKETT, M. D. [Seal].

“ WILLIAM T. GREEN, M. D. [Seal].

“ THOMAS C. GREEN. [Seal].”

It is further averred in the complaint that at the time of the execution of the above contract the appellees were desirous of entering into the practice of medicine at the town of Albion, named in said contract, and that said contract was made with that object in view ; that they fully complied with the terms of said contract, and did enter upon the practice of medicine at said town, and have ever since and now are engaged in the practice of medicine and surgery at said place ; that the appellant, in violation of said contract, has again located in said town of Albion, and has again engaged in the practice of medicine and surgery at said place in competition with the appellees, to their damage. Prayer for an injunction.

The appellant answered, admitting the signing of the agreement set out in the complaint, but says that at the time,

Pickett v. Green et al.

and before said writing was signed by him, it was agreed by and between the parties then signing the same, that the plaintiff William T. Green, was to purchase of the defendant and his wife the following described real estate in Noble county, Indiana, to wit: (describing it), and pay therefor the sum of fourteen hundred dollars as soon as a certain action then pending in the Noble Circuit Court, in which John S. Lytle and David Lytle were plaintiffs, and this defendant and his wife were defendants, to set aside the deed of said property and subject the same to a claim of said plaintiffs, which at that time prevented the defendant and his wife from making said conveyance, as the same was a cloud upon the title, was settled, it being agreed that as soon as said cloud was removed said plaintiff would purchase said property as above set out; that at the time of signing the contract above set out, he signed and acknowledged a deed whereby he was to convey to said William T. Green said real estate, and left the same in the hands of his attorney to be delivered when the purchase-money was paid; that the said Lytle and Lytle dismissed their said suit and agreed not to further prosecute the same on the 30th day of June, 1885; that on said day defendant notified the plaintiff, William T. Green, that said suit had been so dismissed and that he was ready to make said conveyance, but said plaintiff requested further time in which to raise the purchase-money, which was granted; that at the expiration of said time plaintiff William T. Green failed and refused to comply with his part of said agreement; that at the time of signing said agreement the same was delivered to the said William T. Green for him to submit to his brother, the other plaintiff herein, for his approval and signature, but was not to be delivered but returned to defendant's attorney and not delivered until the said William T. Green purchased said real estate and in all things complied with his agreement as hereinbefore set out; that the sale of said real estate for the sum of fourteen hundred dollars was the consideration that

Pickett v. Green *et al.*

moved this defendant to sign said writing set out in the complaint; that said sum of one hundred dollars named in said writing was not the consideration for which this defendant agreed not to practice medicine for fifteen years within ten miles of the town of Albion, nor any part thereof, but was the consideration for said office furniture purchased by plaintiffs, and the purchase of said real estate for fourteen hundred dollars was the sole and only consideration for said restraint of defendant's practice; that plaintiff William T. Green did not return said writing to defendant's attorney as agreed, but wrongfully and for the fraudulent purpose of injuring, annoying, and harassing this defendant, kept the same, and is now seeking to have the same declared valid and enforce the conditions thereof.

The court sustained a demurrer to this answer, and the appellant excepted.

Appellant then filed an additional paragraph of answer, which, in legal effect, is the same as the one above set out, except that it alleges, in addition to the allegations above, that the defendant, by reason of the failure and refusal of the plaintiff William T. Green to take and pay for said real estate, was compelled to and did sell the same at a sacrifice of \$300, and that he received therefor the sum of \$1,200 only, which was the highest and best price he was able to obtain therefor.

The court also sustained a demurrer to this paragraph of the answer, and the appellant again excepted.

The cause was tried by the court, who made a special finding of the facts proven, and stated its conclusions of law thereon, and thereupon entered a decree enjoining the appellant as prayed in the complaint. The errors assigned are:

First. That the court erred in sustaining appellees' demurrer to the first paragraph of the appellants' answer.

Second. That the court erred in sustaining appellee's demurrer to the third paragraph of the appellant's answer.

Third. That the court erred in its conclusions of law.

Pickett v. Green *et al.*

It is claimed and argued by the appellant that the consideration expressed in a written contract may be contradicted or varied to any extent the facts will warrant, and that, therefore, he had the right to aver and prove that the consideration expressed in the written contract set out in the complaint was not the true consideration. This argument is denied by the appellees, and they contend that the rule that the consideration expressed in written instruments may be contradicted or varied by parol testimony has its limitations.

It is certainly the general rule that the consideration expressed in an instrument of writing may be varied or contradicted to almost any conceivable extent. *Rockhill v. Spraggs*, 9 Ind. 30; *McMahan v. Stewart*, 23 Ind. 590; *Thompson v. Thompson*, 9 Ind. 323; *Levering v. Shockey*, 100 Ind. 558.

The reason generally given for the rule is that the language with reference to the consideration is not contractual; it is merely by way of recital of a fact, viz., the amount of the consideration, and not an agreement to pay it, and hence such recitals may be contradicted. There is also a rule, so well known that it needs no citation of authority, to the effect that parol testimony can not be received to vary, contradict, or add to the terms of a written contract; and out of this grows the exception to the rule first above stated, that where the contract is complete upon its face, a stipulation as to the consideration becomes contractual, and where there is either a direct and positive promise to pay the consideration named, or an assumption of an encumbrance on the part of a grantee in a deed which becomes binding upon its acceptance, then the ordinary rules with reference to contracts apply, and the consideration expressed can no more be varied by parol than any other portion of the written contract. *Welz v. Rhodius*, 87 Ind. 1; *Hubbard v. Marshall*, 50 Wis. 322; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334; *Carr v. Hays*, 110 Ind. 408; *Diven v. Johnson*, 117 Ind. 512; *Conant v. National State Bank*, 22 N. E. Rep. 250.

Pickett v. Green *et al.*

In this case it will be observed that the appellant, by the terms of the contract set out in the complaint, in consideration of the agreements and covenants therein set forth, sold to the appellees his office furniture and his good-will in the practice of medicine, and agreed not to practice medicine within a radius of ten miles of the town of Albion for the period of fifteen years. In consideration of this sale and agreement the appellees stipulated in the agreement to pay him one hundred dollars within ten days.

The answers of the appellant, to which the court sustained demurrers, contradict this agreement, and aver that the consideration for the agreement on the part of the appellant not to practice medicine within a radius of ten miles of the town of Albion was an agreement on the part of the appellee, William T. Green, to purchase certain real estate. We are of the opinion that the appellant can not be permitted to thus contradict the written agreement into which he has entered.

The averments in the answer, that the contract set out in the complaint was delivered to William T. Green conditionally, do not show that the contract was not executed, as a contract of that kind can not be delivered to one of the parties as an escrow.

It is to be observed that in this case the appellant has made no effort to rescind the contract; indeed, he has parted with the land which he alleges he agreed to convey to one of the appellees. He still has in his possession the one hundred dollars paid him by the appellees, and has never, at any time, so far as disclosed by the record, tendered it back.

We are of the opinion that both answers pleaded by the appellant in this case were bad, and that the court did not err in sustaining a demurrer thereto.

This case is to be distinguished from the case of *Thayer v. Younge*, 86 Ind. 259. In that case the appellant paid appellee the sum of \$150 for a practice worth \$5,000 per year. In this case the value of appellant's practice does not appear.

 Barr et al. v. Vanalstine.

For anything we know to the contrary, the consideration paid for it was its full value. In that case it was not shown that the breach of the contract had caused, or was likely to cause, any damage. In this case it is found by the court that the breach of the contract set out in the complaint had caused, and was likely to cause, the appellees damage, and that the appellant is insolvent.

This made a case for injunctive relief, for without it the appellees had no remedy. The court stated as a conclusion of law upon the facts found that the appellees were entitled to an injunction enjoining the appellant from practicing medicine in violation of his contract. In this we do not think the court erred.

Judgment affirmed.

Filed Nov. 6, 1889.

120	590
138	81
120	590
152	60
120	590
158	818

 No. 13,901.

BARR ET AL. v. VANALSTINE.

MORTGAGE.—Purchase-Money.—Non-Joinder of Wife.—Foreclosure.—Right of Redemption by Surviving Wife.—Where a wife does not join in a purchase-money mortgage on real estate, and the mortgage is foreclosed, she not being made a party to the foreclosure proceeding, and the premises sold, the wife, upon the death of her husband, has the right to redeem from said sale. Until her husband's death she had no claim, legal or equitable, upon the land. Not having been made a party to the action, she was not affected by the decree of foreclosure.

SAME.—Wife's Inchoate Interest.—Right of Redemption.—Immediately upon the death of her husband, by virtue of section 2491, R. S. 1881, the title to one-third of the said real estate, the husband's estate being worth less than \$10,000, vested in the surviving wife, subject to the said mortgage indebtedness, and then, and not until then, her right to redeem came into existence.

Barr et al. v. Vanalstine.

SAME.—Mortgagee in Possession.—Rents and Profits.—Improvements.—Surviving Wife.—What Charged with.—The appellant in this case having bought the said real estate from the purchaser at the sheriff's sale, as against the surviving wife, occupies the position of a mortgagee in possession; he is chargeable with the rents and profits from the date of the death of the husband, and she is chargeable with the mortgage debt and interest thereon at six per cent. per annum, and likewise for taxes paid, together with the cost of improvements made by the appellant and his grantee.

SAME.—Action to Redeem.—Statute of Limitations.—Demand.—Tender.—Section 294, R. S. 1881, governs the time within which the action to redeem must be brought, and the surviving wife had fifteen years from the death of her husband to institute her suit. She was not bound as a condition precedent to the bringing of the action to redeem to make a demand or a tender.

PRACTICE.—Decree.—Proper Form of.—For the proper form of decree in such a case, see the closing part of the opinion.

SAME.—Unavailable Error.—Where an error has been made in a decree by which the appellant is not injured, but benefited, he can not complain thereof.

From the Allen Circuit Court.

T. W. Wilson and W. G. Colerick, for appellants.

BERKSHIRE, J.—This was an action brought by the appellee against the appellants to redeem from a sheriff's sale. The cause was put at issue and there was a final judgment rendered for the appellee. The errors assigned are:

"1st. The court erred in overruling the appellants' demurrer to the first and second paragraphs of the appellee's complaint, and each of them.

"2d. The court erred in sustaining the appellee's demurrer to the second, fourth, and fifth paragraph of appellants' answer, and each of them.

"3d. The court erred in its conclusions of law on the special findings of facts.

"4th. The court erred in overruling the appellants' motion to state other and different conclusions of law on the special findings of facts.

"5th. The court erred in overruling the appellants' motion for a judgment in their favor on the special findings of facts.

Barr et al. v. Vanalstine.

"6th. The court erred in overruling the appellants' motion to dismiss the plaintiff's case after the announcement by the court of what facts were found by the evidence adduced on the trial.

"7th. The court erred in rendering judgment in favor of the appellee on the special findings of facts."

We understand from the record that on the 22d day of February, 1864, one George W. Ewing, then in life, was the owner in fee simple of lots 5, 6, and 7 in Ewing's subdivision of lot 65, in the original plat of the city of Fort Wayne, Indiana, and on that day conveyed the same, by warranty deed, to one William Vanalstine for the sum of \$1,834, and took his notes for the purchase-money, secured by a mortgage; that the terms of said mortgage were such that the notes all became due February 23d, 1865; that the said George W. Ewing died testate prior to November 1st, 1866; that on that day his executor brought suit in the Allen Circuit Court to foreclose the mortgage, and on the 12th day of January, 1867, obtained a judgment for \$2,021.75, and a decree of foreclosure; that on the 13th day of March, in the same year, an order of sale issued upon the judgment and decree to the sheriff of Allen county, who, after advertising the mortgaged premises for sale, on the 13th day of July, in the same year, sold the same for the full amount of the judgment, to the said executor; that on the 4th day of September, 1868, there having been no redemption from said sale, the said sheriff executed to the said purchaser a deed for said lots; that on the 17th day of March, 1873, the said executor sold and conveyed said real estate to the male appellant for the sum of \$4,500, who then and there paid the purchase-price; that he, at said date, entered into the possession of said lots, and has been in possession since his purchase, claiming to be the owner; that the appellee was the wife of the said William Vanalstine when he made said purchase, and continued to be his first and only wife until his decease, on the 10th day of September, 1873, and resided

Barr et al. v. Vanalstine.

during all the said time in the said city of Fort Wayne ; that she did not join in said mortgage, nor was she a party to said action of foreclosure, nor has she ever made any conveyance of her interest in said lots, either as the wife or widow of her said husband ; that when her husband died he left an estate worth less than \$10,000 ; that the said appellant, when he made his purchase, had no knowledge that the appellee claimed any interest in said real estate ; that the appellee made no demand of the appellant before bringing this action ; nor did she, or any one for her, tender or pay to the appellant all or any part of said mortgage debt before instituting this action ; that this action was commenced November 8, 1886 ; that the said executor paid the taxes upon said real estate from the time he received his deed until he conveyed to the said appellant, who has paid the taxes since, together with certain street assessments.

Under the facts, as stated, the appellee had the right to redeem from said sale upon the death of her husband. *May v. Fletcher*; 40 Ind. 575. This case overrules the case of *Fletcher v. Holmes*, 32 Ind. 497, and has since been followed by later decisions of this court. *Wiltsie Mort. Foreclosures*, 161, and cases cited ; *Bradley v. Snyder*, 14 Ill. 263.

Section 2491, R. S. 1881, being section 27 of the statute of descents, reads thus : "A surviving wife is entitled, except as in section 17 excepted, to one-third of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death : *Provided*, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions." Under this statutory provision, one-third of the said real estate passed to the appellee by virtue of her marital rights subject to the said mortgage indebtedness. *May v. Fletcher, supra* ;

Barr et al. v. Vanalstine.

Bowen v. Preston, 48 Ind. 367; *Brenner v. Quick*, 88 Ind. 546. Not having been made a party to the action, she was not affected by the decree of foreclosure. *May v. Fletcher*, *supra*; *Gordon v. Lee*, 102 Ind. 125; *Catterlin v. Armstrong*, 101 Ind. 258; *Wiltie Mort. Foreclosures*, 160.

Until the death of the husband of the appellee, she had no claim, legal or equitable, upon or to the land. *Traders Ins. Co. v. Newman*, *ante*, p. 554, and authorities cited. Had her husband survived her, the purchaser at the sheriff's sale would have held the title to said real estate free from any right of redemption. *Paulus v. Latta*, 93 Ind. 34; *McCormick v. Hunter*, 50 Ind. 186; *Grissom v. Moore*, 106 Ind. 296. So soon as the husband of the appellee died, by virtue of the said statute the title to one-third of the said real estate vested in her, subject to the said mortgage indebtedness, and then, and not until then, her right to redeem came into existence. *Brenner v. Quick*, *supra*; *Wiltie Mort. Foreclosures*, 162.

As there is no other section of the statute of limitations applicable to actions to redeem real estate, section 294, R. S. 1881, governs, and the appellee had fifteen years from the death of her husband in which to bring her action. As the action was commenced within fifteen years, it was not barred by the statute of limitations.

The answer which is pleaded as an estoppel *in pais* is entirely barren of such facts as work a verbal estoppel. It is so clearly bad that we do not care to set it out in this opinion or to refer to it more at length.

The appellee was not bound as a condition precedent to the bringing of her action to redeem to make a demand or a tender. *Childs v. Childs*, 10 Ohio St. 339; *Bradley v. Snyder*, *supra*; *Clark v. Reyburn*, 8 Wall. 318.

In the case under consideration, as against the appellee the appellant occupied the position of a mortgagee in possession; he was chargeable with the rents and profits from the date of the death of the husband of the appellee, and she

Barr *et al.* v. Vanalstine.

was chargeable with the mortgage debt and interest thereon at six per cent. per annum, and likewise for taxes paid, together with the cost of improvements made by the appellant and his grantee. *Hosford v. Johnson*, 74 Ind. 479; *Gage v. Brewster*, 31 N. Y. 218; *Wiltsie Mort. Foreclosures*, 191, 199; *Johnson v. Harmon*, 19 Iowa, 56; *American Button-hole, etc., Co. v. Burlington, etc., Ass'n*, 61 Iowa, 464; *Bradley v. Snyder*, *supra*.

Proceeding upon this basis, the court should have made an adjustment, and whatever, if anything, was found due to the appellant, a decree should have been rendered for the sale of the two-thirds of the real estate held by him to pay the same, and in case of a failure to realize a sum sufficient to pay the same, then for the sale of the appellee's one-third. *Grable v. McCulloh*, 27 Ind. 472; *McCord v. Wright*, 97 Ind. 34; *Bunch v. Grave*, 111 Ind. 351.

In case nothing was found due on the mortgage debt to the appellant, then the court should have so decreed, and that the appellee was the owner of one undivided one-third of said real estate, free from encumbrance, and quieted her title; but, on the other hand, if the court found that there was anything due on the mortgage debt, the amount should have been adjudged, and a decree rendered for the sale of the whole of said real estate, but that the two-thirds held by the appellant be first sold, and if sold for a sum sufficient, then that the appellee's one-third be protected.

There is nothing in the conclusion to which we have arrived in conflict with *Bunch v. Grave*, *supra*. That case and the one under consideration proceeded on different theories, and rest on different principles. We adhere to the conclusion reached in that case.

The decree which was rendered in this case was for the redemption and sale of the appellee's one-third of the said real estate, and does not disturb the two-thirds held by the appellant. It is erroneous, but the error is not one of which

 Nowlin *et al.* v. Whipple *et al.*

the appellant can complain, because he is not injured, but benefited, thereby.

If the appellee was here complaining of the judgment of the court we would probably be required to reverse the judgment, but as she is not the judgment must be affirmed.

Judgment affirmed, with costs.

Filed Nov. 6, 1889.

 No. 13,590.

NOWLIN ET AL. v. WHIPPLE ET AL.

EASEMENTS.—*Way.*—*User.*—*License.*—*Permissive Use Not Adverse.*—*Prescription.*—Where one, after having used a way for a period less than twenty years, continues to use it for more than thirty years afterwards under an agreement with the owner, such a use, constituting a permissive use under a license, can not be adverse, and will not serve as the basis of a prescriptive right. A general right, as by prescription, can not be maintained by alleging and proving a particular or permissive right.

SAME.—*License.*—*When Irrevocable.*—While a mere naked license to use the land of another is revocable at the pleasure of the licensor, where a consideration has been paid, or value parted with, on the faith that the license shall be perpetual, it can not be revoked to the injury of the licensee.

SAME.—*Parol License.*—*Expenditure in Reliance Upon.*—*Irrevocable, Unless Licensee Placed in Statu Quo.*—Where a parol license has been executed and acted upon, and expense incurred in perfecting an essement over the land of another in reliance upon the license, it can not afterwards be revoked without placing the licensee *in statu quo*.

SAME.—*Erection of Gates by Licensee.*—*Agreement for Perpetual Easement—Acquiescence in.*—*Irrevocable License.*—Where persons have erected and maintained gates at their own expense upon the faith of an agreement that they are to have a perpetual easement to pass over the lands of another, the agreement having been fully executed and acquiesced

120	506
127	08
130	506
136	08
120	506
140	470
140	578
143	607
120	506
146	253
147	532
120	506
150	552
120	506
154	22
126	506
163	545
120	506
166	546

Nowlin et al. v. Whipple et al.

in by the parties who made it for more than thirty years, the license is irrevocable.

From the Dearborn Circuit Court.

G. M. Roberts and *C. W. Hopt*, for appellants.

C. Dandy, for appellees.

MITCHELL, J.—This was an action by Annie E. Nowlin and others against Lucian C. Whipple and his wife, Nancy Whipple, the purpose of the suit being to obtain a decree perpetually enjoining the defendants from using an alleged private way over a tract of land which the plaintiffs own as tenants in common. Nancy Whipple is the owner of a fifty-acre tract of land, and she and her co-defendant assert a right to a drive-way twelve feet wide and about 1000 feet in length across the plaintiffs' land, in order to gain access to the above-mentioned tract, which they cultivate.

The facts pleaded and proved are substantially as follows: Prior to 1836 both tracts of land involved in the present suit were the property of Ezekiel Jackson, who died about that time. The tract now owned by the plaintiffs was inherited by, and set off to, the decedent's son, Jeremiah, and that owned by Mrs. Whipple, who is a daughter of Ezekiel Jackson, was acquired by her in like manner. While the land was thus owned by Mrs. Whipple and her brother the Whipples used the drive-way in question.

In 1853, the first-named tract became the property of Jeremiah Nowlin, who agreed with the Whipples, that if they would erect and maintain gates at each end of the drive-way, and look after the division fence, they might continue to use the way perpetually across his land, in order to reach their tract.

The gates were erected, and the agreement otherwise complied with. There was some evidence tending to show that Jeremiah Nowlin was one of the commissioners who made partition of the land between the Jackson heirs, and that in adjusting their shares a right of way had been given in

Nowlin et al. v. Whipple et al.

favor of the fifty-acre tract over that owned by the plaintiffs, and that the way in dispute had been used continuously, under a claim of right, for forty years or more prior to 1885, when the plaintiffs, the descendants of Jeremiah Nowlin, sought to prevent the further use of the way. The question now is, whether upon the foregoing facts the judgment of the court denying the injunction can be maintained?

To establish an easement or private way by prescription over the land of another, it must appear that the way was used continuously for a period of twenty years adversely to the owner, under a claim of right, and that the owner acquiesced in such use. *McCardle v. Barricklow*, 68 Ind. 356; *Parish v. Kaspere*, 109 Ind. 586; *Hill v. Hagaman*, 84 Ind. 287.

Adverse user is such an use of the property as the owner himself would exercise, disregarding the claims of others entirely, asking permission from no one, and using the property under a claim of right. Such a use of property continued without interruption for a period of twenty years or more, is equivalent to a grant. *Roots v. Beck*, 109 Ind. 472; *Blanchard v. Moulton*, 63 Maine, 434.

Where it appears that one has enjoyed a right of way over the land of another for a period of twenty years or more, such enjoyment, without evidence as to how it began, is presumed to have been in pursuance of a grant, and the burden of showing the contrary lies on the owner of the land. The presumption which arises from proof of uninterrupted adverse use for the required period is, that there was a grant, and this presumption can only be overturned by proof that the use was by permission, or in some other way not inconsistent with the rights of the owner of the land. *Garrett v. Jackson*, 20 Pa. St. 331; *Pierce v. Cloud*, 42 Pa. St. 102; *McArthur v. Carrie's Admr*, 32 Ala. 75 (70 Am. Dec. 529.)

The answer shows affirmatively that the defendants, after having used the way for a period less than twenty years, con-

Nowlin *et al.* v. Whipple *et al.*

tinued to use it for more than thirty years afterwards under an agreement with the owner. This constituted a permissive use under a license. Such a use can not be adverse, and will not serve as the basis of a prescriptive right. *Shellhouse v. State*, 110 Ind. 509. A general right, as by prescription, can not be maintained by alleging and proving a particular or permissive right. *Parish v. Kaspere*, *supra*; *Pentland v. Keep*, 41 Wis. 490; *Chestnut Hill, etc., Co. v. Piper*, 77 Pa. St. 432; 9 Am. & Eng. Cyc. of Law, 367.

The answer stated facts sufficient to show an irrevocable license. After the way had been used for a long time, less than twenty years, however, there was an agreement, founded on a valuable consideration, that the defendants should enjoy a perpetual easement or right of way over the land.

While it is well established that a mere naked license to use the land of another is revocable at the pleasure of the licensor, yet where a consideration has been paid, or value parted with on the faith that the license shall be perpetual, it can not be revoked to the injury of the licensee. *Snowden v. Wilas*, 19 Ind. 10; *Robinson v. Thrailkill*, 110 Ind. 117, and cases cited.

An executed parol license may become an easement upon the land of another, and may impose a servitude on one tenement, or estate, in favor of another dominant estate. *Dark v. Johnston*, 55 Pa. St. 164; 6 Am. & Eng. Cyclop. of Law, 142; Washburn Easements, 24.

Where a parol license has been executed and acted upon, and expense incurred in perfecting an easement over the land of another in reliance upon the license, it can not afterwards be revoked without placing the licensee *in statu quo*. *Woodbury v. Parshley*, 7 N. H. 237.

The defendants erected and maintained gates at their own expense upon the faith of an agreement that they were to have a perpetual easement to pass over the plaintiffs' lands. This agreement having been fully executed, and acquiesced in by the parties who made it for more than thirty years, a

Crow v. Bannister.

court of equity will not now permit the license to be revoked. There was no error.

The judgment is affirmed, with costs.

Filed Nov. 6, 1889.

No. 14,341.

CRAVENS v. THE EAGLE COTTON MILLS COMPANY.

From the Jennings Circuit Court.

C. E. Walker, A. D. Van Osdol and H. Francisco, for appellant.

C. A. Korbly and W. O. Ford, for appellee.

MITCHELL, J.—The questions involved in this appeal are identical with those considered in *Cravens v. Eagle Cotton Mills Co.*, *ante*, p. 6, and in pursuance of the stipulation that a decision in one case should determine both, the judgment of the circuit court in the above entitled cause is affirmed, with costs.

Filed June 19, 1889; petition for a rehearing overruled Sept. 20, 1889.

No. 14,929.

AVERY v. THE INDIANA AND OHIO OIL, GAS, AND MINING COMPANY.

From the Jay Circuit Court.

C. Corwin, J. M. Smith, W. E. Niblack, A. L. Mason, J. C. Nelson and Q. A. Meyers, for appellant.

J. B. Cohrs, R. C. Bell and S. R. Morris, for appellee.

ELLIOTT, C. J.—The judgment in this case is affirmed upon the authority of *State, ex rel., v. Indiana and Ohio, etc., Mining Co.*, *ante*, p. 575.

Filed Nov. 6, 1889.

No. 13,807.

CROW v. BANNISTER.

From the Sullivan Circuit Court.

W. S. Maple and J. S. Bays, for appellant.

J. T. Beasley, A. B. Williams and J. C. Briggs, for appellee.

MITCHELL, J.—This was an action by Crow against Bannister, to recover the possession of a tract of land in Sullivan county. Trial by the court, finding and judgment for the defendant.

The only question made upon this appeal relates to the sufficiency of the evidence to sustain the finding of the court. It is only necessary to say the evidence fully sustains the finding.

Judgment affirmed, with costs.

Filed Oct. 16, 1889.

INDEX.

ABATEMENT.

See CRIMINAL LAW, 35, 36.

ACCESSORY.

See CRIMINAL LAW, 23.

ACKNOWLEDGMENT.

See DEED.

ACTION.

See DAMAGES, 4; MONEY HAD AND RECEIVED; RECEIVER.

Parties to.—Husband and Wife.—Joint Assignment of Errors by.—Where husband and wife are parties to an action they may join in an assignment of error as to rulings which affect the wife alone, the rule in 110 Ind. 131, not being applicable to husband and wife.

Stewart v. Babbs, 563

ADMINISTRATOR'S SALE.

See DECEDENTS' ESTATES, 7, 8.

ADMISSIONS.

See BANKS AND BANKING, 3.

AFFIDAVIT.

See CRIMINAL LAW, 6; JUDGMENT, 2.

AFFIDAVIT AND INFORMATION.

See CRIMINAL LAW, 18.

AGENCY.

See COMMON CARRIER, 3; EVIDENCE, 7; INSURANCE, 6; PROMISSORY NOTE, 7, 8.

AMENDMENT OF AFFIDAVIT.

See CRIMINAL LAW, 19.

AMENDMENT OF PLEADING.

See MONEY HAD AND RECEIVED, 2; NEW TRIAL, 4; PLEADING, 3, 10.

AMENDMENT OF STATUTE.

See CONSTITUTIONAL LAW, 1 to 8.

ANIMALS.

See RAILROAD, 2, 3.

APPEAL.

See APPEAL BOND; BENEFIT SOCIETY; CONTINUANCE; REAL ESTATE, ACTION TO RECOVER, 5.

1. *Reserved Questions of Law.—Final Judgment.*—Section 630, R. S. 1881, authorizing an appeal for the decision of reserved questions of law upon an abbreviated record, does not contemplate an appeal from a ruling before final judgment. *Taylor v. Board, etc., 121*

2. *Same.—Stay of Proceedings.—Interlocutory Order.*—Where, after the filing of an answer, the trial court orders that further proceedings in the cause be stayed until another cause pending in the Supreme Court shall be decided, such order is an interlocutory one, from which an appeal will not lie. *Ib.*
3. *County Commissioners.—Gravel Road Proceedings.—Final Order.*—An appeal will not lie from an order of the board of county commissioners for the construction of a free gravel road, and appointing a committee to apportion the costs of construction upon the lands benefited; an appeal lies only from the final order confirming the report of the committee. *Tomlinson v. Peters, 257*
4. *Will not Lie after Receiving Part of Judgment.*—Where a judgment defendant pays to the clerk of the court the amount of the judgment, and the plaintiff's attorney, prior to being discharged, receives from the clerk the amount of his lien for services, the plaintiff is precluded by section 632, R. S. 1881, from thereafter taking an appeal from the judgment. *McCracken v. Cabel, 266*
5. *Partition Proceeding.—When Appeal May be Taken.—Interlocutory Judgment.*—Where the action is one primarily for partition, an appeal will not lie from the interlocutory order of the court appointing commissioners to make partition between the parties, but where the orders for partition and appointment of commissioners are mere incidents to the judgment and decree of the court, and the principal questions involved are the title to real estate, the right to the possession thereof, and the recovery of damages, the judgment of the court as to these questions is a finality, and the right of appeal exists. *Jackson v. Myers, 504*

APPEAL BOND.

See PLEADING, 9.

Term-Time Appeal.—Approval of Bond.—Where an appeal is taken in term, and the court fixes the amount of the bond required, approves the surety named and designates the time within which the bond must be filed, this constitutes an approval of the bond by the court, and an approval by the clerk is not necessary. *Hartlep v. Cole, 247*

APPRAISEMENT.

See CHATTEL MORTGAGE, 2.

ARBITRATION AND AWARD.

1. *Agreement to Arbitrate.—Not Entered of Record.—Nunc Pro Tunc Entry.*—An agreement to submit all matters in issue to arbitration, made in the presence of the court, but not entered of record, is not a perfected agreement, for the court can speak only by its record, and a *nunc pro tunc* entry can not be resorted to, to correct it. *Kelley v. Adams, 340*
2. *Same.—Parol Agreement.*—At common law, an agreement to arbitrate, and the award thereon, in parol was valid, and notwithstanding the statutory provision in regard to arbitrations, the rules of the common law are still in force. *Ib.*
3. *Same.—Guardian and Ward.*—A guardian at common law could agree to an arbitration for his ward. *Ib.*

ARGUMENT OF COUNSEL.

See INSTRUCTIONS TO JURY, 2; PRACTICE, 5.

Right to Open and Close.—In an action upon a promissory note the plaintiff is entitled to open and close the argument, where the issue is joined by a general denial of the complaint. *Stayer v. Joyce, 99*

ARREST OF JUDGMENT.

See PRACTICE, 3.

ARSON.

See CRIMINAL LAW, 34.

ASSAULT AND BATTERY WITH INTENT.

See CRIMINAL LAW, 9, 10, 28.

ASSESSMENT.

See DRAINAGE; MUNICIPAL CORPORATION; STREETS AND ALLEYS.

ASSIGNMENT.

See CHAMPERTY; INSURANCE, 1, 2; TOWNSHIP TRUSTEE.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See INJUNCTION, 1; INSOLVENT DEBTORS.

1. *Voluntary Assignment—Debtor's Exemption.—Waiver.*—Where a statute which confers the right of exemption also prescribes the manner in which the debtor may avail himself of it, his failure to do so at the time and in the manner prescribed is a waiver of the privilege.
Graves v. Hinkle, 157
2. *Same.—Manner and Time of Claiming Exemption.—Can not be Made After Sale of Real Estate.*—As section 2670, R. S. 1881, provides that a debtor who has executed a deed of assignment for the benefit of his creditors must claim, and have set off to him, at the time of the appraisal the property which he desires to have exempted, he can not, after the real estate has been sold in discharge of liens, then claim an exemption out of the residue of the proceeds remaining in the hands of the commissioner.
Ib.

ASSIGNMENT OF ERRORS.

See ACTION; INTERROGATORIES TO JURY, 2; PLEADING, 8; SUPREME COURT.

ATTACHMENT.

See GARNISHMENT.

1. *Courts of Other States.—Jurisdiction.—Presumption.*—The writ of attachment is the creature of statute law, yet where a court of a State in which the common law is presumed to prevail has issued such a writ, in aid of a pending proceeding in which it had jurisdiction of the subject-matter and to which the defendant appeared, it will be presumed, in an action in this State upon the attachment bond, that the court did not exceed its powers.
Cunningham v. Jacobs, 306
2. *Same.—Common-Law Bond.—Complaint on.*—An action may be maintained in this State upon an attachment bond executed in a proceeding had in the courts of a State in which the common law presumably prevails, without setting out any statute authorizing it to be taken, as such bond will be deemed a common-law bond, and a recovery may be had thereon under the rules applicable to actions on ordinary contracts.
Ib.
3. *Garnishment.—Promissory Note.—Bona Fide Endorsee.—Agreement to Repay Garnishee Maker.*—An agreement by an attachment plaintiff that if a garnishee defendant will pay the amount of the judgment rendered against him he will repay the amount, with interest, attorney's fees and costs, in case the note evidencing the garnishee's indebtedness to the attachment defendant is afterwards enforced against him by a bona fide endorsee, is valid and enforceable.
Taylor v. Williams, 414

4. *Same.—Evidence.*—In such case the record of the attachment proceedings, the record of the endorsee's judgment, and the declarations of the attachment plaintiff are admissible in evidence. *Ib.*

ATTORNEY.

See EVIDENCE, 3.

ATTORNEY AND CLIENT.

See GARNISHMENT; INSOLVENT DEBTORS.

ATTORNEY'S FEES.

See GARNISHMENT.

BANKS AND BANKING.

See INJUNCTION, 1.

1. *Receipts for Taxes.—Deposit.—When Considered Made.—Pass-book Entry.—Misrepresentations of Solvency.*—Although the credit for the amount of the tax receipts is not entered on the books of the bank until five days after it is credited in the pass-book, the deposit will be deemed to have been made when credited in the pass-book; and a county treasurer who after that time checks out more than he deposits, including the amount credited for taxes, is uninjured by misrepresentations of the solvency of the bank. *Watson v. Lamb, 514*
2. *Same.—Debits and Credits.—Entry of.—Balance.—When Considered Struck.*—Where money is paid into and drawn out of a bank, or other debts and credits are entered by the consent of both parties in the general banking account of the customer, a balance may be considered struck at the date of each payment or entry on either side of the account. *Ib.*
3. *Same.—Deposit.—Cashier.—Bank-book Entry.—Effect of.—Admissions.*—Where a deposit is made, the amount and date thereof being entered by the cashier or teller in the bank-book of the depositor, such entries, when made by the proper officer, bind the bank as admissions. *Ib.*
4. *Same.—Checks and Drafts Received as Deposits.—Title to Same.—Liability of Bank.—Depositor.*—If checks, drafts, or other evidence of debt are received in good faith as deposits, the bank crediting them as so much money, the title to the checks or drafts is immediately transferred to the bank, which becomes legally liable to the depositor as for so much money deposited. *Ib.*

BENEFIT SOCIETY.

Sick Benefits.—Remedy within the Order.—Right to Resort to Courts.—Where the only right of appeal allowed a member of a benefit society with respect to a claim for sick benefits is from the decision of the supreme medical officer of the society thereon, the refusal of an officer of the local branch to which the claimant belongs, whose duty it is to do so, to certify to his claim, the justness of which is not questioned, thereby preventing him from presenting it to the supreme medical officer for decision, in the manner required by the laws of the society, exhausts his remedy within the order, and he may resort to the courts to enforce his claim. *Supreme Sitting Order, etc., v. Stein, 270*

BICYCLE.

See NEGLIGENCE, 1 to 4.

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 38; DRAINAGE, 2; SUPREME COURT, 7.

1. *Must be Signed by Judge.*—A bill of exceptions which is not signed or attested by the judge is without force.

Louisville, etc., R. W. Co. v. Kane, 140

2. *Presentation to Judge.*—Under the statute (section 629, R. S. 1881) a bill of exceptions does not become a part of the record unless it has been presented to the judge within the time limited, and the date of its presentation stated in the bill. *Rigler v. Rigler, 431*
3. *Some.—Excuse for not Presenting in Time.—Absence of Judge.—Affidavits.*—The Supreme Court can not consider affidavits showing the absence of the judge as an excuse for not presenting the bill of exceptions until after the time fixed had expired. *Id.*
4. *Same.—Insertion of Date Nunc Pro Tunc.*—In respect to presenting and signing bills of exceptions after the time limited therefor has expired, the only proper course is to make an application to the presiding judge for the insertion of the date in the bill *nunc pro tunc.* *Id.*

BILLS AND NOTES.

See PROMISSORY NOTE.

BOND.

See GRAVEL ROAD; GUARDIAN AND WARD; JUDGMENT, 7 to 12; OFFICE AND OFFICER; RECEIVER; REPLEVIN; TOWNSHIP TRUSTEE; TRUST AND TRUSTEE.

BURDEN OF PROOF.

See EXECUTION, 5; PROMISSORY NOTE, 6.

CANCELLATION OF INSTRUMENT.

See CONTRACT, 2.

CARRIER AND PASSENGER.

See DAMAGES, 7, 8; RAILROAD.

CASES OVERRULED, MODIFIED AND DISTINGUISHED.

Stephens v. State, 107 Ind. 185, overruled. *Murphy v. State*, 116
Bosseker v. Cramer, 18 Ind. 44, overruled. *Board, etc., v. Pearson*, 426
Allen v. Jones, 47 Ind. 438, modified; *Naltner v. Blake*, 56 Ind. 127, distinguished. *Jackson v. Smith*, 580
Thayer v. Young, 86 Ind. 259, distinguished. *Pickett v. Green*, 584

CHAMPERTY.

See GRAVEL ROAD, 3.

Assignment of Claim.—An assignment of a claim can not be defeated by the debtor by alleging facts showing that a champertous agreement was entered into by the plaintiff and the original holder of the claim at the time of the assignment. *Hart v. State, ex rel., 33*

CHANGE OF VENUE.

Who Entitled to.—*Statute Construed.*—The provision of the statute (section 412, R. S. 1881), that a change of venue shall be granted "upon the application of either party," means the plaintiffs or defendants collectively, and does not entitle each individual defendant or plaintiff to a change. *Peters v. Banta, 416*

CHATTEL MORTGAGE.

See PLEADING, 3.

1. *Fraud.—Satisfaction.—Theory of Action.—Judgment.*—Where the gravamen of an action by creditors is fraud in the execution of chattel mortgages by the debtor, a judgment for the plaintiffs ordering the mortgaged property to be sold in satisfaction of their claims, solely on the theory that the mortgages have been satisfied by the payment of the indebtedness which they were given to secure, is not authorized. *Levy v. Chittenden, 37*

2. *Same.—Sale.—Appraisement.*—In such case, fraud not being found, it is error to order the mortgaged property to be sold without relief from valuation and appraisement laws. *Ib.*

CHECKS AND DRAFTS.

See BANKS AND BANKING.

CITY.

See DRAINAGE, 9 to 11; MUNICIPAL CORPORATION; OFFICE AND OFFICER;
STREETS AND ALLEYS.

CITY CLERK.

See OFFICE AND OFFICER.

CITY COMMISSIONERS.

See STREETS AND ALLEYS.

COLLATERAL ATTACK.

See DRAINAGE, 9; JUDGMENT, 1 to 3; RAILROAD, 12.

COMMON CARRIER.

See RAILROAD.

1. *Connecting Lines.—Relation to Original Contract.*—Where a contract is made with a common carrier for the transportation of goods, no intermediate carriers being designated, and containing no provisions that its stipulations shall enure to the benefit of all the carriers, an intermediate carrier, by accepting the goods for transportation, is bound by the ordinary rules in the absence of a special contract, and can claim the benefit of none of the provisions of the original contract. *Adams Express Co. v. Harris, 73*
2. *Same.—Detention for Freight.—Waiver.*—A common carrier waives his right to detain goods for the freight if his refusal to deliver is on the ground that they are not in his possession at the place where a demand is duly made. *Ib.*
3. *Same.—Declarations of Agent.—When Principal Bound.*—A corporation having invested an agent with general authority to adjust claims against it, the declarations of such agent in the adjustment of a claim are competent evidence against it. *Ib.*
4. *Same.—Limitation of Damages.—Not Available when Negligence is Shown.*—A limitation of damages, without reduction in rate of freight, will not avail when negligence is shown. *Ib.*

COMMON COUNCIL.

See DRAINAGE, 9; MUNICIPAL CORPORATION.

COMMON LAW.

Presumption that it Prevails in Other States.—In the absence of any showing to the contrary, the presumption is that the common law prevails in other States. *Cunningham v. Jacobs, 306*

COMMON LAW BOND.

See ATTACHMENT, 2.

COMMON SCHOOL FUND.

See SCHOOL LANDS.

County Auditor's Statement.—Conclusive Character of.—Unconstitutional Act.—The act of 1865 (Acts of 1865, Spec. Sess., p. 144), providing that the statement of the county auditors as to the amount of school funds held in trust by their respective counties, when approved by the su-

perintendent of public instruction, "shall be taken as conclusive evidence of the facts therein contained," is unconstitutional.

Board, etc., v. State, ex rel., 282

CONSIDERATION.

See CONTRACT, 8; DECEDENTS' ESTATES, 5; FRAUDULENT CONVEYANCE, 2.

CONSTITUTIONAL LAW.

See COMMON SCHOOL FUND; NATURAL GAS.

1. *License for Sale of Intoxicating Liquors.—Act of 1889.—Validity of.*—The act of March 11, 1889, Acts of 1889, p. 395, empowering cities and incorporated towns to increase the sum theretofore required to be paid for a license to sell intoxicating liquors, is not invalid as violating section 21, article 4, of the State Constitution.
Bush v. City of Indianapolis, 476
2. *Same.—Amendment of a Statute.—Amendatory Act.—What Must be Set Out.*—It is well settled in this State that under section 21, article 4, of the Constitution a valid amendment of a statute may be made by setting out the section as amended, and that it is not necessary to set out the section to be amended. *Ib.*
3. *Same.—Title and Body of the Act Must be Considered Together.*—Under our Constitution it requires both the title and the body of the act to constitute a valid law. In a consideration of the question as to whether the Legislature has observed the forms prescribed by the Constitution in the enactment of a law, they must be considered together. *Ib.*
4. *Same.—Amendatory Act.—Title of Act.—When Sufficient.*—The title of the act in question sets out at full length the title of the act to be amended, reciting that it is the intention to amend a certain section of said act, and that said section is section 5317, R. S. 1881.
Held, that no valid objection can be urged to the title of the act. Ib.
5. *Same.—Body of the Act.—How Construed.*—Where the body of the act, after such a statement in the title, refers to the section to be amended as section 5317, R. S. 1881, without any reference to the section of the original act, there can be no doubt that it was the legislative intent to amend said section, and the amendment is properly made. *Ib.*
6. *Same.—Title of the Act Amended.—When Unnecessary to Refer to in the Body of the Act.*—Considering the title and the body of the act together, if it distinctly and unequivocally appears what particular section of a statute is to be amended, it is not necessary to refer, in the body of the amended act, to the title of the act thus amended. *Ib.*
7. *Same.—Amendment of Statutes.—Constitutional Provisions Governing Same.*—The clause of the Constitution which forbids the amendment of a statute by a mere reference to its title is prohibitory, while the clause which requires that the section as amended shall be published and set forth at full length is mandatory. *Ib.*
8. *Same.—Unconstitutional Statutes.—Power of Courts to Declare.—Doubts, How Resolved.*—The power of the courts to declare a statute unconstitutional is a high one, and is never exercised in doubtful cases. To doubt is to resolve in favor of the constitutionality of the law. We are unable to say that there is no doubt as to the unconstitutionality of the amendatory act under consideration. *Ib.*
9. *Interstate Commerce.—Commercial Commodities.—Transportation of Between States.*—Transportation of commercial commodities from state to state is interstate commerce, and the state legislature can neither burden nor restrict it.
State, ex rel., v. Indiana, etc., Co., 575
10. *Same.—Foreign Corporations.—Legislative Power over.—Limit of.*—While the legislature may regulate or restrict the business of foreign cor-

porations within the state, it can not do so where it operates upon interstate commerce. *Ib.*

11. *Same.—Rights of Property.—Legislative Control of.*—It is not in the power of the legislature to prevent one person from buying, or another from selling property. The rights of property are not subject to such absolute legislative control. This is the general rule, and it applies to such property as natural gas, petroleum, and coal. *Ib.*
12. *Same.—Police Power.—Exercise of by the State.*—The states may, so long as they do no more than legitimately exercise the police power, legislate upon matters connected with interstate commerce. The act under consideration, however, can not be deemed a legitimate exercise of the police power of the state. It does not assume to provide for the safety, health, or comfort of the citizens of the state. *Ib.*
13. *Same.—Provisions of a Statute.—Separation of.*—When can not be Made.—When the provisions of a statute are so closely blended that a separation can not be effected without substituting another law for that intended to be enacted, none can be made by the courts. *Ib.*

CONTEST OF WILL.

See WILL, 2 to 11.

CONTINUANCE.

Pending Appeal in Other Action.—It is no ground for a continuance that an appeal has been taken and is pending in another case between the same parties, but, in a proper case and upon a proper application, there may be a stay of proceedings. *Peters v. Banta, 416*

CONTRACT.

See ARBITRATION AND AWARD; CHAMPERTY; COMMON CARRIER, 1; CORPORATION, 1 to 6; DAMAGES, 1, 2; EVIDENCE, 4; INTOXICATING LIQUOR, 7 to 10; MARRIED WOMAN; PARTIES.

1. *Incomplete Instrument.—Averment of Extrinsic Facts.*—Jonah Freed executed an instrument of this tenor: "This is to certify that I have this day received a deed from Richard Mills and wife for certain real estate, in consideration of which I am to apply the payment thereof to a note that Henry G. Smith holds against Richard Mills, Peter Linn, D. F. Linn and Jonah Freed, for three hundred and seventy-five dollars."
Held, in an action by Mills against Freed, that this instrument is not, on its face, a complete and enforceable contract, and to authorize a recovery extrinsic facts, giving it a legal effect, must be averred. *Freed v. Mills, 27*
2. *Rescission.—Cancellation of Mortgage.*—Where one of the parties to a tripartite transaction, although so directed by the court, refuses to take the steps necessary to secure a performance of the contract, he can not complain of a judgment putting all the parties in *status quo* by rescinding the contract and cancelling the release of a mortgage held against him and entered satisfied in pursuance of the contract. *Mason v. Burk, 404*
3. *Rescission.—Action to Set Aside Conveyance.—Reconveyance of Consideration.*—Where a plaintiff seeks to set aside a conveyance of land to defendant, alleging that his grantor's title to the land which was the consideration of the conveyance, purchased by the defendant but not conveyed, was defective for non-conformity in the execution and acknowledgment of his deed with the law of Tennessee, of which the grantor was a resident, he will not be permitted to rescind his contract in the absence of an offer to reconvey, the formal defects complained of not rendering the title void. *Westhafer v. Patterson, 459*

4. *Same.—Rescission.*—A person will not be permitted to rescind a contract in order to reclaim what he has parted with and to retain what he has received in the transaction. *Ib.*
5. *Specific Performance.—Real Estate.—Conveyance of Wife's Interest in.—Statute of Frauds.—Debtor and Creditor.*—An agreement not in writing, but which it is averred was to be reduced to writing, entered into between a creditor and the wife of his debtor, whereby the creditor agreed, in consideration of the conveyance to him by the debtor, his wife joining, of certain real estate, to convey to the debtor's wife, upon the fulfilment of certain conditions, an undivided one-third interest in said real estate, falls within clause 4, section 4904, R. S. 1881, and is incapable of specific performance, being a parol contract for the sale of lands, under the statute of frauds. *Jackson v. Myers, 504*
6. *Same.—Execution of Deed.—Failure to Demand.—Fraud.*—Conceding that the creditor was morally bound to execute the conveyance to his debtor's wife, without a demand therefor, no demand being alleged, the failure to do so would not constitute a fraud. To hold so would be to abolish all distinction between fraud and breach of contract. *Ib.*
7. *Same.—Demand and Refusal.—Statute of Frauds.—Presumption of Fraud.*—If a demand had been made for the execution of the agreement and a refusal, and afterwards a demand for a deed, and a refusal, no presumption of fraud would have arisen such as would have taken the case out of the operation of the statute of frauds; at most, this would have shown an unwillingness to comply with the contract. *Ib.*
8. *Agreement in Restraint of Trade.—Consideration.—Parol Testimony to Add to.—When Inadmissible.—Contractual Stipulation.—Injunction.*—Where, by the terms of a written contract, a physician, in consideration of the agreements and averments therein set forth, sold his office furniture and good-will, and agreed not to practice medicine within specified territorial limits for a definite time, the contract is complete and the stipulation as to the consideration is contractual. In a proceeding to enjoin the physician from practicing, by the terms of the contract, he will not be permitted to show by parol testimony that in addition to the consideration named, and the real consideration for his refraining from practice, was the agreement of one of the plaintiffs to purchase from him a certain piece of real estate, which he failed to do. *Pickett v. Green, 584*
9. *Same.—Conditional Delivery.—Escrow.—Injunction Proceeding.—Pleading.—Answer.*—An averment in an answer to the complaint in the injunction proceeding that the delivery of the contract sued on was conditional, does not show the non-execution of the contract, such a contract being incapable of delivery to one of the parties as an escrow. *Ib.*
10. *Same.—Breach of.—When Cause for Injunction.—Defendant's Insolvency.*—A finding by the court that a breach of contract has caused, and is likely to cause, the plaintiffs damage, the defendant being insolvent, makes a case for injunctive relief, the plaintiffs having no other remedy. *Thayer v. Younge, 86 Ind. 259, distinguished. Ib.*

CONTRIBUTORY NEGLIGENCE.

See INTERROGATORIES TO JURY, 3; INTOXICATING LIQUOR, 3, 4; MASTER AND SERVANT.

CONVERSION.

See GUARDIAN AND WARD; OFFICE AND OFFICER.

CONVEYANCE.

See CONTRACT, 3, 5 to 7; FRAUDULENT CONVEYANCE; GUARDIAN AND WARD; REAL ESTATE
VOL. 120.—39

CORPORATION.

See CONSTITUTIONAL LAW, 10; CRIMINAL LAW, 29, 30; PLEADING, 4.

1. *Subscription for Stock.—Contract.—Collateral Matters.*—Where a corporation is organized for the purpose of acquiring and operating a cotton mill, any pending negotiations between such corporation and another corporation, engaged in the same business, relating to the purchase of the latter's plant and good-will, are matters collateral to contracts of subscription made with the new corporation, and in no manner affect or enter into the same. *Cravens v. Eagle Cotton Mills Co.*, 6
2. *Same.—Collateral Agreement.—Consummation of.—Parol Evidence.*—Where a subscriber claims exoneration from liability on his subscription on the ground that an alleged previous agreement between the corporation and another company for the purchase of its plant has been changed and the purchase made upon different terms, it is competent to show that no agreement between the two corporations was consummated prior to the contract of subscription. *Id.*
3. *Same.—Condition Precedent.—Liability for Subscription.*—A stipulation in a contract of subscription that the amount subscribed is not to be payable until any contract which may be made with another corporation for the purchase of its mills has been ratified by the persons holding a majority of the stock, has reference to a matter collateral to the contract of subscription, and the making of a contract of a specified character is not a condition precedent to the liability of the subscribers for stock, and they can not withdraw their subscriptions, or defeat their collection by assailing the contract that is actually made and ratified as stipulated. *Id.*
4. *Same.—Conditional Subscription.—Acceptance.*—Where subscriptions are made upon the condition that solvent subscriptions to a certain amount shall be obtained, the obtaining of the required amount is an effectual acceptance of all conditional subscriptions, and the latter then become absolute. *Id.*
5. *Same.—Withdrawal of Subscription.*—A subscriber can not withdraw his subscription, even though it be conditional, unless unreasonable delay occurs in performing the condition. *Id.*
6. *Same.—Existence of Corporation.—Estoppel.*—Where a contract of subscription is made upon the assumption of the existence of the corporation, both the corporation and the subscriber are afterwards estopped from denying its existence. *Id.*
7. *Turnpike.—Director.—Services Rendered by in Construction of.—Compensation.*—Where a director of a turnpike company, by agreement with his co-directors, performs labor and furnishes material necessary and proper in the construction and repair of the bridges and road-bed of the turnpike, the capital stock subscribed for the purpose having been exhausted, he is entitled to recover a reasonable compensation for such labor and materials. *Greensboro, etc., T. P. Co. v. Stratton*, 294
8. *Gravel Road.—Forfeiture of Charter.*—Where a gravel road company undertakes by its articles of association to construct a road nine miles in length and builds but six, by the provisions of section 3641, R. S. 1881, it forfeits its right only to the unconstructed part, and retains all the rights and privileges conferred by the statute as to the remaining part. *State, ex rel., v. Brownstown, etc., G. R. Co.*, 337
9. *Same.—Failure of Directors to File Report.*—The failure of the directors to file a report with the Secretary of State does not work a forfeiture of the charter. *Id.*

COSTS.

Action in Circuit Court.—Recovery of Less than Fifty Dollars.—Under the statute (section 5091, R. S. 1881), the plaintiff in an action in the cir-

~~omit court~~ for a money demand on contract is liable for costs if he recovers ~~less~~ than fifty dollars, exclusive of costs, unless the judgment is reduced below that amount by set-off or counter-claim.

Berry v. Town of Merom, 161

COUNTY.

See NEGLIGENCE, 5 to 10; SCHOOL LANDS.

COUNTY AUDITOR.

See COMMON SCHOOL FUND.

COUNTY COMMISSIONERS.

See APPEAL, 3; INTOXICATING LIQUOR, 5; RAILROAD, 12, 13.

COUNTY TREASURER.

See CRIMINAL LAW, 45; INJUNCTION, 1.

CRIMINAL LAW.

1. *Oppressive Garnishment.—Exemption Laws.—Sending Claim Out of State to Evade.*—One who himself takes a claim out of this State with intent to deprive a debtor of the benefit of the exemption laws, "sends" the claim out of the State within the meaning of section 2162, R. S. 1881, making such act an offence. *State v. Dittmar, 54*
2. *Malicious Trespass.—Claim of Right.*—A prosecution for malicious trespass will not lie where the act charged was done under an honest claim of right, without a mischievous or malicious intent. *Barlow v. State, 56*
3. *Minor.—Pool Table.—Permission to Play Upon.—Indictment.—Duplicity.—Statute Construed.*—Under section 2087, R. S. 1881, which provides that any person owning or managing a pool table, etc., who allows or suffers a minor to play at or upon such table, shall, upon conviction thereof, for each game so allowed or suffered to be played, be fined in any sum not more than fifty dollars nor less than five dollars, the offence consists in allowing the minor to play, the number of games played under one permission relating merely to the question of punishment, and hence where an indictment charges the playing of four games of pool at one time and place, it is not bad for duplicity. *Kiley v. State, 65*
4. *Same.—Witness.—Immaterial Testimony.*—In a prosecution for permitting a minor to play upon a pool table, a question propounded to a witness asking him whether or not "he is the same person who had been a witness in several liquor cases," is objectionable, as calling for immaterial testimony. *Ib.*
5. *Intoxicating Liquor.—Sale on Election Day.—Special Election in Different Ward.*—Under section 2098, R. S. 1881, it is unlawful for a licensed vendor to sell intoxicating liquors on the day of a special election for councilman in a ward different from that in which his place of business is situate. *Quatter v. State, 92*
6. *Same.—Affidavit.—Jurat.—Omission of Officer's Seal.*—Where the record affirmatively shows that the affidavit upon which the prosecution is founded was sworn to, the omission of the officer to attach his seal to the jurat is not of such materiality as to warrant a reversal of the judgment. *Ib.*
7. *Same.—Sunday not Dies Juridicus.*—Sunday is not a judicial day, and is not to be computed in determining the number of days in which the business of a court has not been transacted; but if it were, a party who goes to trial after three days have passed without the transaction of business waives his right to object on that ground. *Ib.*
8. *Rape upon Child under Twelve Years Old.—Information.*—Where an in-

- formation charges rape upon a female child under twelve years of age, it is not necessary to allege that she was ravished forcibly and against her will. *Murphy v. State*, 116
9. *Same.*—*Assault and Battery with Intent to Commit Rape.*—*Child under Twelve Years Old.*—*Resistance not Necessary to Constitute Offence.*—Under an information charging rape upon a child less than twelve years old, there may be a conviction for assault and battery with intent to commit rape, without evidence tending to show that the defendant's advances were resisted by the child, or that she was incapable of resisting. *Stephens v. State*, 107 Ind. 185, overruled. *Id.*
 10. *Same.*—*Touching of Person.*—*Failure of Proof.*—A conviction for assault and battery with intent to commit rape upon a child under twelve years of age, is not sustained where there is no proof that the defendant touched the person of the child, or that he did any act from which a touching can be inferred. *Id.*
 11. *Jury.*—*Discharge without Agreement.*—*Reasonable Time for Deliberation.*—*Discretion of Court.*—The length of time that a jury shall be kept together in a criminal case without a verdict is a matter very much within the discretion of the court; and where, considering the nature of the offence and the punishment prescribed, they have been out a reasonable time without agreement, they may be discharged without working an acquittal of the defendant. *State v. Leach*, 124
 12. *Same.*—*Justice of Peace.*—*Disagreeing Jury.*—*Discharge.*—*Jeopardy.*—In a prosecution before a justice of the peace for being found drunk in a public place, the discharge of the jury by the justice after they have spent three hours in deliberating upon their verdict without agreement, is not an abuse of discretion and does not work the acquittal of the defendant on the ground that he has been once in jeopardy. *Id.*
 13. *Disorderly Liquor Shop.*—*Indictment.*—*Language of Statute.*—As section 2097, R. S. 1881, creates and fully defines the offence of keeping a disorderly liquor shop, "to the annoyance or injury of any part of the citizens of this State," an indictment thereunder which follows the language of the statute in charging the offence is sufficient. *Skinner v. State*, 127
 14. *Same.*—*"Citizens" of this State.*—*Meaning of Term.*—*Proof.*—*Inference.*—In a prosecution under such section, proof that the shop in question was located on a public street in a town in this State, and that the persons who were annoyed thereby resided in the town, near the shop, justifies the jury in inferring that such persons were citizens of the State, without direct proof to that effect, as the word "citizen," as used in said statute, means an inhabitant in any city, town, or place. *Id.*
 15. *Same.*—*Witness.*—*Interest.*—*Procuring Testimony.*—*Impeachment.*—*Collateral Matter.*—Where, in a prosecution for keeping a disorderly liquor shop, a witness for the State on cross-examination denies having said to another person "All the rest of us are going to say that he (the defendant) was drunk all the time, that we never saw him sober, and you just get up there and say the same thing," evidence to contradict such witness is competent, as such matter is not a collateral one. *Id.*
 16. *Disturbing Meeting.*—*"Salvation Army."*—One who enters a room where a collection of persons known as the "Salvation Army" are conducting religious services according to their accustomed method, and, with his hat on and a cigar in his mouth, persists in conducting himself in an offensive manner, and so diverts attention from the services then in progress, is guilty of disturbing a meeting, within the meaning of section 1988, R. S. 1881. *Hull v. State*, 153
 17. *Information.*—*Descriptive Matter.*—*Surplusage.*—*Variance.*—An information for disturbing a religious meeting is complete without an alle-

gation that the defendant's conduct was to the disturbance of certain named persons, and as the latter allegation is surplusage, a failure to prove that all the persons whose names are given were disturbed, is not a variance. *Ib.*

18. *Trial upon Information.—Grand Jury, Sessions of.*—The circuit or criminal courts are not bound to call a grand jury for each term of court or for any particular time in a term, so that, under section 1679, R. S. 1881, a person who has been arrested in vacation for any offence, except treason and murder, and recognized to appear at the succeeding term of court, may be prosecuted upon affidavit and information if no session of a grand jury has intervened. *Kennegar v. State, 176*
19. *Same.—Receiving Stolen Goods.—Amendment of Affidavit.*—Where a defendant is charged before a justice of the peace with the offence of receiving stolen goods, and is recognized to appear in the circuit court to answer the charge, the State may there file an amended affidavit and an information thereon in which the accused is charged in separate counts with receiving stolen goods and with the larceny of the same goods. *Ib.*
20. *Same.—Verdict.—Harmless Defect.—Judgment.*—Where a verdict is defective in a particular harmless to the defendant, a judgment which follows the verdict is not void, and sentence thereon may be pronounced. *Ib.*
21. *Same.—Election by State.*—Where a defendant is charged in separate counts with receiving stolen goods and with the larceny of the same goods, a refusal to require the State to elect upon which count it will try the defendant is not erroneous. *Ib.*
22. *Same.—Juror.—Previously Expressed Opinion.—New Trial.*—To entitle a defendant to a new trial on account of a previously expressed opinion by a juror, he must show affirmatively that at the time he accepted such person as a juror he was ignorant of the facts disqualifying him. *Ib.*
23. *Felony.—Accessory before the Fact.—Indictment.—Sufficiency of after Verdict.—Construction of Statute.*—Section 1734, R. S. 1881, providing that whenever an accused person is to be charged as an accessory before the fact, "the following (or words of similar import) shall be inserted after the statement of the offence committed by the principal: 'And the said A. B. was accessory before the fact to the said felony' (here set forth how he aided and abetted the principal)," is mandatory, and an indictment which does not conform thereto, although sufficient in other respects, is bad, even as against a motion in arrest of judgment. *Sage v. State, 201*
24. *Same.—Repeal of Statute.—Will not Cure Previous Error.*—An indictment must be good according to the statute in force at the time the judgment is pronounced, and the subsequent repeal of the statute will not cure an error previously committed. *Ib.*
25. *Trespass.—Unenclosed Land.*—Under section 1941, R. S. 1881, it is trespass to enter upon the land of another after being forbidden, whether the land be enclosed or not. *State v. French, 229*
26. *Same.—"Premises."—Meaning of Word.*—As the word "premises" means "lands and tenements," an affidavit under section 1941 is not bad because such word is used instead of the word "land." *Ib.*
27. *Same.—Affidavit for Trespass.—Description of Premises.*—An affidavit for trespass under section 1941, is bad unless it contains some identification or description of the premises upon which it is alleged the offence was committed. *Ib.*

28. *Assault and Battery, with Intent to Murder.—Indictment.—Sufficiency of.*—An indictment for assault and battery with intent to commit murder, charged that G. J. "did then and there unlawfully, in a rude, insolent and angry manner, touch C. W., with the intent then and there him, the said C. W., feloniously, wilfully, purposely, and with premeditated malice to kill and murder, contrary," etc.
Held, that the indictment is good, under the statute, and that it was error to quash the part thereof relating to the felonious intent.
State v. Jenkins, 363
29. *Obstruction of Highway.—Corporation May be Prosecuted.*—A corporation may be prosecuted criminally for obstructing a public highway. Sections 1897 and 1964, R. S. 1881.
State v. Baltimore, etc., R. R. Co., 298
30. *Removal of Obstruction.—Mandate.*—The fact that a corporation may be compelled by mandate to remove an obstruction placed by it in a public highway is not a defence to a prosecution for maintaining such obstruction. *Ib.*
31. *Indictment for Obstructing Highway.*—All that is necessary to constitute a good indictment for obstructing a public highway is to allege such facts as meet the requirements of the statute defining the offence. *Ib.*
32. *Same.—Criminal Intent.—Bad Faith.*—To constitute the offence of obstructing a public highway, it is not necessary, under the statute, that there be a criminal intent, and the indictment need aver none, nor need it aver that the acts were done in bad faith. *Ib.*
33. *Condition of Highway before Obstruction.*—An indictment for obstructing a public highway need not allege the condition of the highway before the obstruction complained of. *Ib.*
34. *Arson.—Attempt to Commit.*—The statute relating to arson, R. S. 1881, section 1927, prescribes no penalty for an attempt to commit arson, and the offence defined is complete, and the penalty enforceable, only when property is actually burned.
Kinningham v. State, 322
35. *Grand Jury.—Irregularities.—Abatement.*—Mere irregularities in drawing and organizing a grand jury composed of qualified persons, which are not prejudicial to the substantial rights of the defendant, and involve no charge of fraud or corruption, are not available as a plea in abatement.
Cooper v. State, 377
36. *Same.—Waiver of Right to Plea in Abatement.*—By pleading to the indictment and procuring a change of venue, the defendant waives his right to file a plea in abatement, and to object to the qualification of grand jurors or to the mode of drawing or constituting that body. *Ib.*
37. *Same.—Instructions to Jury.—Reversal of Judgment.*—If, upon considering all of the instructions together, it appears that the law was stated with substantial accuracy, so that the jury could not have been misled, there is no ground for reversal, although a particular instruction or detached portion may not be precisely accurate. *Ib.*
38. *Same.—Bill of Exceptions.—Statement Concerning Instructions.*—Where it does not appear by an affirmative statement in the bill of exceptions that the instructions set out therein are all that were given, the judgment will not be reversed unless the instruction complained of is so radically wrong as to be incurable. *Ib.*
39. *Same.—New Trial.—Newly Discovered Evidence.*—To secure a new trial on the ground of newly discovered evidence, either diligence or an excuse for not exercising it must be shown, and it must also appear that the new evidence is of such character as to raise a reasonable presumption that the result would be different on a second trial. *Ib.*
40. *Same.—Excessive Use of Intoxicants.—Delirium Tremens.*—After an accused

- has been convicted of murder over a defence of self-defence, affidavits of newly discovered witnesses to the effect that for several months prior to the homicide the accused drank intoxicating liquors to such an extent that he either had, or was on the verge of having, the *delirium tremens* when the homicide occurred, of which facts the accused, as an excuse for not exercising diligence, deposes that he was ignorant until the affidavits were read to him after the trial, are not sufficient to authorize a new trial. *Ib.*
41. *Same.*—*Unsoundness of Mind.*—*Conclusion of Witness.*—Statements of witnesses, in affidavits in support of an application for a new trial on the ground of new evidence, that by the excessive drinking of intoxicating liquors the accused's mental faculties had become so impaired that he was not responsible for his acts, are mere conclusions, which will be disregarded. *Ib.*
42. *Same.*—*Separation of Jury.*—*Misconduct.*—A separation by one or two jurors for a necessary purpose, attended by the proper officer, is not misconduct which entitles a party to a new trial. *Ib.*
43. *Oppressive Garnishment.*—*Exemption Laws.*—*Sending Claim Out of State to Evade.*—One who himself takes a claim out of this State with intent to deprive a debtor of the benefit of the exemption laws by instituting proceedings in garnishment in another State, "sends" the claim out of the State, within the meaning of section 2162, R. S. 1881, making such act an offence. *State v. Dittmar, 388*
44. *Criminal Statute.*—*Construction of.*—*Indictment.*—*Legislative Intent.*—Where a criminal statute is not to receive a construction as broad as the language used would seem to warrant, but is to be narrowed by construction, contrary to the general rule an indictment drawn in the language of the statute is not sufficient. The indictment must be drawn so as to effectuate the intention of the Legislature by which it was framed. *Stropes v. State, 562*
45. *Same.*—*County Officers.*—*Embezzlement.*—*Indictment.*—*Insufficiency of.*—*Failure to Charge a Felony.*—*Motion to Quash.*—So, where an indictment in the language of the statute (Acts of 1883, p. 106), making it a felony for the county officers therein named to fail to pay over to their successors on demand all moneys remaining in their hands, charges a county treasurer with having failed to pay to his successor the funds remaining in his hands, without an allegation that such failure was either felonious or unlawful, the indictment is defective as not charging the failure to be felonious, and a motion to quash should be sustained. *Ib.*

DAMAGES.

- See COMMON CARRIER, 4; INTOXICATING LIQUOR, 2 to 4; MASTER AND SERVANT; NEGLIGENCE; PLEADING, 1; RAILROAD; SALE; STREETS AND ALLEYS.
1. *Measure of.*—*Breach of Contract to Saw Lumber.*—Where one agrees to saw timber belonging to another into lumber of certain dimensions and for a certain purpose, but saws it in such a manner as to make it unfit for the purpose intended, the measure of damages is the difference between the market value of the lumber as it is sawed and its market value if sawed according to the contract. *Sunman v. Clark, 142*
2. *Same.*—*Theory of Action.*—*Skill.*—*Negligence.*—*Instruction.*—If, in such case, the owner of the lumber predicates his right to recover damages upon the unskilful and negligent manner in which it was sawed, and upon this theory issue is joined and evidence heard, he can not object to an applicable instruction, on the ground that under the contract a

failure to saw the lumber as agreed gave a right of action for damages without regard to the question of skill. *Ib.*

3. *Same.—Harmless Instruction.*—Where the jury determine that a party is not entitled to recover any damages, no available error can be predicated upon an instruction which assumes to state the rule for the measurement of damages. *Ib.*
4. *Wrongful Death.—Action by Administrator.—Next of Kin.—Complaint.*—Where a complaint for damages resulting from the death of a person by the wrongful act of another, judged by its general scope and tenor, shows that the deceased left next of kin, and that the action is prosecuted by an administrator in his representative capacity, it is sufficient if it states a cause of action in his favor in that capacity, although some persons are described as next of kin who are not such. *Clare v. McIntire, 268*
5. *Same.—Driving Vicious Stallion into Crowd.—Liability for Injury.*—One who drives a vicious and unmanageable stallion into a crowd of vehicles, standing in a place set apart for them, away from the travelled road, at an agricultural fair where there is a great gathering of people, and, knowing the vicious disposition of the horse, strikes him with a whip, thereby causing him to leap on a wagon and injure an occupant thereof, is liable for damages. *Ib.*
6. *Excessive Recovery.—Supreme Court.*—The Supreme Court will not reverse a judgment on the ground of excessive damages unless the amount allowed appears at first blush to be outrageous and excessive. *Ohio and Mississippi R. W. Co. v. Judy, 397*
7. *Same.—Railroad.—Unlawful Expulsion of Passenger.—Non-Excessive Damages.*—The amount of five thousand five hundred dollars is not excessive damages for injuries sustained by a passenger by falling over a truck at a railroad depot, after his unlawful expulsion from a train, where the evidence shows that the passenger was an active business man, capable of earning from one hundred and fifty dollars to more than two hundred dollars per month, and that at the time of the trial he was deprived of the use of one arm, with a strong probability that the injury would be permanent. *Ib.*
8. *Same.—Jury not Required to Itemize Damages.*—In an action for damages resulting from being unlawfully ejected from a train, the jury can not properly be required to itemize, and assess a separate amount for, each element entering into and making up the gross sum allowed, and in determining whether the damages are excessive only the gross sum will be considered. *Ib.*

DEBTOR AND CREDITOR.

See CHATTEL MORTGAGE; CONTRACT, 5 to 7; FRAUDULENT CONVEYANCE; GARNISHMENT; INSOLVENT DEBTORS; JUDGMENT, 10, 11.

DECEDENTS' ESTATES.

See FAMILY SETTLEMENT; WIDOW; WILL.

1. *Pleading.—Complaint to Annul Letters of Administration.—Paragraph Bad for Uncertainty.—Paragraph Showing Assets.*—A paragraph of complaint in an action to annul letters of administration on the ground of there being no assets of the estate within the jurisdiction of the court when the administrator was appointed, alleging that no assets or property of the decedent had come into the county, and if so the same had been administered before the appointment of the administrator, is bad for uncertainty; also, a paragraph is bad showing indebtedness under judgment upon suit brought by the administrator, whose letters of administration it is sought to annul for the reason that there are no assets. *Langedale v. Woollem, 78*

2. *Preceding Administrator.—Inability to Discover Assets.—Administrator, Appointment of, de bonis non.*—That a preceding administrator is unable to discover assets belonging to the estate, will not prevent the appointment of an administrator *de bonis non*. *Ib.*
3. *Same.—Common Pleas Court.—Presumption of Jurisdiction.*—Jurisdiction of the common pleas court, a court of general jurisdiction of matters probate at the time of the appointment of the administrator herein, in the absence of a showing to the contrary, will be presumed. *Ib.*
4. *Devastavit by Administrator.*—A *devastavit* occurs when an executor or administrator wastes the assets of the estate, and consists of any act, omission or mismanagement by which the estate suffers loss; or a *devastavit* may result from the payment of claims which, by the exercise of diligence, the administrator might have ascertained to be unjust and illegal. *Beardsley v. Marsteller, 319*
5. *Same.—Insolvent Estate.—Refunding Receipt.—Recovery upon.—Consideration.*—Where an administrator pays to a creditor of the estate the full amount of his claim and takes a receipt containing an agreement to the effect that, in the event the estate is found to be insolvent, the creditor will refund to the administrator the amount received less the dividend to which he is entitled, there is no *devastavit*, the agreement is upon a sufficient consideration, and if the estate proves to be insolvent the administrator may enforce repayment. *Ib.*
6. *Claim Against.—Action by Guardian to Set Aside Allowance.—Parol Partition of Land.—Evidence of.*—Where, in an action by a guardian to set aside a claim against the estate, evidence is introduced by the defendants relating to a parol partition of land by the deceased and others, which land is afterwards sold by the claimant to the deceased, the purchase-price constituting the claim, it is admissible.. *Brown v. Marshall, 323*
7. *Administrator's Sale.—Action to Set Aside.—Limitation of Action.*—Where heirs seek to set aside a sale of real estate by an administrator to pay debts, under an order of a court having no jurisdiction, a right of action accrues from the time of the taking possession of the purchasers under the certificate of purchase, the statute of limitations beginning to run at the same time, and not when the sale was confirmed, it being a void sale. *L'Hommedieu v. Cincinnati, etc., R. W. Co., 435*
8. *Same.—Partition.—Estoppel.*—Where a complaint in a partition proceeding alleges that the decedent died intestate, leaving as his only heirs his widow and two children; that the administrator sold the estate by order of court to pay debts; that the defendants were the owners of the real estate as purchasers at the administrator's sale, subject to the rights of the plaintiff and the children, the plaintiff's interest being an undivided one-third during the natural life of the widow, these allegations put in issue the validity of the administrator's sale, and the title acquired through it; and the court having decreed partition, and the children having been adjudged to be the owners of the remainder of the widow's life-estate, they are estopped from bringing an action to recover the land. *Ib.*

DEED.

See CONTRACT, 3, 5 to 7; MORTGAGE, 1; PLEADING, 16, 17; REAL ESTATE. *Acknowledgment.—Defective Certificate.—Who may Take Advantage of.*—As a general rule, only subsequent purchasers for value can take advantage of the omission of words of identification, or other formal defects in the certificate of acknowledgment. *Westhafer v. Patterson, 459*

DELIVERY.

See CONTRACT, 9; PROMISSORY NOTE, 2 to 4, 8.

DEMAND.

See CONTRACT, 6, 7; MORTGAGE, 9.

DEPOSITION,

See PRACTICE, 6.

DEPOSITOR.

See BANKS AND BANKING.

DESCENT.

See WILL, 12.

DESCRIPTION OF REAL ESTATE.

See INTOXICATING LIQUOR, 1; MORTGAGE, 2, 3; REAL ESTATE; REAL ESTATE, ACTION TO RECOVER, 2.

DEVASTAVIT.

See DECEDENTS' ESTATES, 4, 5.

DEVISE.

See FAMILY SETTLEMENT; WILL.

DISAGREEMENT OF JURY.

See CRIMINAL LAW, 11, 12.

DISCRETIONARY POWER.

See CRIMINAL LAW, 11, 12; INSTRUCTIONS TO JURY, 2; SPECIAL FINDING.

DISORDERLY LIQUOR SHOP.

See CRIMINAL LAW, 13 to 15.

DISTURBING RELIGIOUS MEETING.

See CRIMINAL LAW, 16, 17.

DIVORCE.

Undefended Petition.—Duty of Prosecuting Attorney.—Striking Out Pleading.—

Under section 1038, R. S. 1881, it is the duty of a prosecuting attorney, when a petition for divorce remains undefended, to appear and resist the petition; but where, after he has filed an answer, the defendant appears and answers, the court may, without error, strike out the pleading of the prosecutor, as the latter may, if he has reason to believe that the proceeding is collusive, continue his appearance and proceed under the pleadings of the parties. *State v. Brinneman, 357*

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; MASTER AND SERVANT.

DRAINAGE.

1. *Act of 1883.—Notice.*—The notice required by the drainage act of 1883 must follow, and not precede, the filing of the petition, and where the notice is that the petition will be filed at the next term of court, it is not sufficient, and the proceedings may be dismissed upon the motion of one who has not submitted to the jurisdiction of the court. *Sites v. Miller, 19*
2. *Same.—Refusal to Give Further Notice.—Dismissal of Petition.—Bill of Exceptions.—Practice.*—No question is presented on appeal as to the action of the trial court in dismissing a petition for drainage, upon the refusal of the petitioner to give further notice of the filing of the petition, unless it is preserved by a bill of exceptions. *Ib.*
3. *Procedure.—Commissioner.—Failure to Report.—Effect of.*—Where a petition was filed under the drainage act of 1883, and the requisite

- notice given, and the drainage commissioners were unable to report on the day designated, by reason of the term-time of the court having been changed by legislative act,
Held, that under sections 1325, 1326 and 1327, R. S. 1881, and a saving clause in the legislative act, a motion to discontinue the petition was properly overruled. *Bohr v. Neuenchwander*, 449
4. *Same.—Commissioners' Report.—Discontinuance of Petition.*—Independently of the statutory provisions, the failure of the commissioners to report at the time designated will not discontinue the petition, the petitioner being without fault. *Ib.*
 5. *Same.—Report.—Extension of Time.—Who may ask for.*—When it becomes evident before the designated day that the commissioners will be unable to file their report, any of the parties interested may ask an extension of time, which the court may grant, a request from the commissioners being unnecessary. *Ib.*
 6. *Same.—Clerk of Court.—Petition and Order Fixing Report Day.—Failure of Clerk to Deliver to Commissioners.*—The failure of the clerk to deliver to the commissioners a copy of the petition and order fixing the time at which they should report, does not vitiate their report. *Ib.*
 7. *Same.—Testimony.—Witness's Opinion.*—A question as to whether, from an examination the witness had made of a certain creek, it had sufficient fall to drain the remonstrant's land, is inadmissible, as calling for the witness's opinion, and not for facts within his knowledge. *Ib.*
 8. *Same.—Evidence.—Commissioners' Report.—Remonstrant.*—The report of the commissioners of drainage is inadmissible in evidence in a proceeding where a remonstrant in the circuit court is contesting both the report and the petition. *Ib.*
 9. *Assessment for.—Common Council.—Jurisdiction of.—Collateral Attack upon.—Suit to Quiet Title.*—An assessment for construction of sewer drainage is within the subject of the jurisdiction of the common council, and can not be declared void in a collateral attack to quiet title to land sold for the assessment, unless it appears there was no authority over the particular improvement ordered or the particular property assessed. *Jackson v. Smith*, 520
 10. *Same.—Local Assessment.—Sale of Land for.—Quieting Title.—General Decree.—Payment of Lien.—Void Assessment*—One who seeks to quiet title to land sold for an assessment for drainage is not entitled to a general decree while any part of the assessment is due; one who would save his title must pay, or tender payment of, the lien. Unless the assessment is wholly void he is not entitled to a general decree. *Ib.*
 11. *Same.—Way Improved.—City's Ownership of.—How Disproved*—Where an improvement has been made and property benefited, the property-owner seeking afterwards to show that the way improved did not belong to the city, must show that it was not acquired by condemnation, purchase, dedication, or prescription. *Ib.*

EASEMENTS.

1. *Way.—User.—License.—Permissive Use Not Adverse.—Prescription.*—Where one, after having used a way for a period less than twenty years, continues to use it for more than thirty years afterwards under an agreement with the owner, such a use, constituting a permissive use under a license, can not be adverse, and will not serve as the basis of a prescriptive right. A general right, as by prescription, can not be maintained by alleging and proving a particular or permissive right. *Nowlin v. Whipple*, 596
2. *Same.—License.—When Irrevocable.*—While a mere naked license to use the land of another is revocable at the pleasure of the licensor,

where a consideration has been paid, or value parted with, on the faith that the license shall be perpetual, it can not be revoked to the injury of the licensee. *Id.*

3. *Same.*—*Parol License.*—*Expenditure in Reliance Upon.*—*Irrevocable, Unless Licensee Placed in Statu Quo.*—Where a parol license has been executed and acted upon, and expense incurred in perfecting an easement over the land of another in reliance upon the license, it can not afterwards be revoked without placing the licensee in statu quo. *Id.*
4. *Same.*—*Erection of Gates by Licensee.*—*Agreement for Perpetual Easement.*—*Acquiescence in.*—*Irrevocable License.*—Where persons have erected and maintained gates at their own expense upon the faith of an agreement that they are to have a perpetual easement to pass over the lands of another, the agreement having been fully executed and acquiesced in by the parties who made it for more than thirty years, the license is irrevocable. *Id.*

EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

EMBEZZLEMENT.

See CRIMINAL LAW, 45.

ENDORSEMENT.

See ATTACHMENT, 3; PROMISSORY NOTE.

ESCROW.

See CONTRACT, 9; PROMISSORY NOTE, 8.

ESTOPPEL.

See CORPORATION, 6; DECEDENTS' ESTATES, 8; INSOLVENT DEBTORS, 2; INTOXICATING LIQUOR, 6; OFFICE AND OFFICER, 2; PROMISSORY NOTE, 1, 4; REPLEVIN, 1; TOWN, 2.

EVIDENCE.

See ATTACHMENT, 4; COMMON CARRIER, 3; CONTRACT, 8; CORPORATION, 2; CRIMINAL LAW, 4, 15; DECEDENTS' ESTATES, 6; DRAINAGE, 7, 8; REAL ESTATE, ACTION TO RECOVER, 2; SET-OFF, 2; SUPREME COURT, 3, 8, 9; WILL, 2 to 11.

1. *Promissory Note.*—*Alterations.*—A promissory note is admissible in evidence, after proof of the genuineness of the signature, without evidence being first introduced in explanation of alterations appearing on its face. *Stayner v. Joyce, 99*
2. *Same.*—*Witness.*—*Impeachment.*—*Testimony on Former Trial.*—*Stenographer's Report of.*—The stenographer's long-hand report of the testimony given by a witness on a former trial of a cause is not competent evidence to contradict or impeach such witness; but, if the proper foundation is laid, the stenographer may testify as to statements made by the witness on the former trial. *Id.*
3. *Letters between Parties.*—*Attorney may be Compelled to Produce.*—An attorney who has possession of a letter which passed between litigants may be compelled to produce it; and if it is relevant to the controversy, it is competent evidence. *Harrisburg Car, etc., Co. v. Sloan, 156*
4. *Same.*—*Contract Concerning Different Transaction.*—A contract concerning a transaction different from the one involved in a pending action is not competent evidence. *Id.*
5. *Objection to.*—*Practice.*—Where a witness who is competent to testify as to some matters is placed upon the stand for examination, an objection then interposed that such witness is not competent to testify as to certain other matters, thus imposing upon the court the burden

- of watching the testimony and separating the competent from the incompetent, is not well taken. *Staser v. Hogan*, 207
6. *Same.—Admission of Incompetent Testimony.—Motion for New Trial.*—Where some of the testimony of a witness is competent, a motion for a new trial which is predicated upon the admission of testimony of such witness must point out, with clearness and certainty, the particular evidence objected to. *Ib.*
 7. *Promissory Note.—Agreement to Allow Discount.—Declarations of Agent.*—Where, in an action upon a promissory note, the defendant claims a deduction in pursuance of an alleged agreement between him and the plaintiff, whereby a two per cent. discount was to be allowed on all payments made before the maturity of the note, it is not competent, where the agent has testified as to his authority, for the defendant to testify that the plaintiff's agent, to whom money was paid, deducted the discount, saying it was according to his instructions. *Hargrove v. John*, 285
 8. *Same.—Letter Written at Instance of Party.—Showing of Authority.*—In such case, a letter purporting to have been written by a third person to the agent, at the instance of the plaintiff, is not admissible in the absence of evidence that the plaintiff authorized the letter to be written. *Ib.*
 9. *Admissions of Witness in Chief.—Rebuttal.*—A plaintiff who has used a defendant as a witness in chief, can not afterwards introduce his admissions in rebuttal, and there is no abuse of judicial discretion in their rejection. *Brown v. Marshall*, 323
 10. *Erroneous Admission.—Harmless Error.*—The erroneous admission of evidence is only available for reversal when prejudicial to the rights of the appellant. *Taylor v. Williams*, 414
 11. *Personal Injury.—Statements as to Nature and Location of Pain.—Surgeon.*—The surgeon who attended an injured person may, in an action for damages, give in evidence the statements made by the plaintiff as to the nature and location of the pain from which he was suffering. *Board, etc. v. Pearson*, 426
 12. *Weight of.—Supreme Court.—Entire Absence of Proof.*—The Supreme Court will not examine the evidence in the record to determine the weight of evidence; but will, on the other hand, do so to ascertain whether there is an entire absence of proof as to all or any of the facts necessary to be established to entitle the plaintiff to judgment. *Joseph v. Kronenberger*, 495
 13. *Town Plat.—Exclusion of.—Harmless Error.*—When the record of an alleged plat of a town, without date, acknowledgment, or date of recording, is refused admission in evidence, but another plat, conceded to be identical with the one excluded, is admitted, there is no error in excluding it. *City of Huntington v. Hawley*, 508
 14. *County Commissioners' Record.—Entry in.—Parol Testimony.—Inadmissibility of.*—Parol testimony is inadmissible to prove that an entry in the commissioners' record, properly signed and attested, was placed there without their authority. It is wholly immaterial who prepared the entry, or that it was prepared with or without the authority of the board of commissioners. If they adopted and passed it, it was as effectual as if it had been prepared by their order. *Hill v. Probst*, 523
 15. *Same.—Tax Duplicate.—Admission of in Evidence.*—The admission in evidence of a tax duplicate showing that one who seeks to enjoin the collection of a railroad tax is delinquent as to other taxes, is not objectionable. *Ib.*

EXCESSIVE DAMAGES.

See DAMAGES, 6 to 8; NEW TRIAL, 6.

EXECUTION.

See REPLEVIN, 3; SHERIFF'S SALE, 2.

1. *Insolvent Debtor*.—A debtor who has no property subject to execution is insolvent. *State, ex rel., v. Harper, 23*
2. *Same*.—*Exemption*.—*Lien*.—Where a debtor owns less property than he is entitled to claim as exempt from execution, such property is not subject to levy, and an execution does not become a lien thereon. *Id.*
3. *Same*.—*Sheriff*.—*Failure to Levy*.—*Exempt Property*.—A sheriff is not liable for failing to make a levy where the debtor owns no more property than he is entitled to claim as exempt from execution. *Id.*
4. *Same*.—*Presumption that Debtor will Claim Exemption*.—While the right to claim property as exempt is a personal privilege of the debtor, the law presumes that he will make such claim. *Id.*
5. *Same*.—*Tort*.—*Presumption*.—*Burden of Proof*.—In an action against a sheriff for failing to make a levy, it will not be presumed in favor of the plaintiff that his judgment was rendered in tort, but if such is the fact he must establish it. *Id.*
6. *Issuance of After Ten Years*.—Section 675, R. S. 1881, Construed.—Relates Wholly to the Remedy.—Section 675, R. S. 1881, providing for the issuance of executions after the lapse of ten years, relates wholly to the remedy, and applies to the issuance of executions on all judgments rendered before, or after, its enactment, and is clearly within legislative authority. *Leonard v. Broughton, 536*
7. *Same*.—*Leave of Court to Issue*.—*Sale Made Without Leave*.—*Who can Complain of*.—*Judgment Creditor*.—Even if it should be necessary to have leave of court to issue an execution, the execution being issued and sale having been made upon it without objection from the judgment debtor, the sale made upon it would be valid, and could not be questioned by other judgment creditors. *Id.*

EXECUTORS AND ADMINISTRATORS.

See DAMAGES, 4; DECEDENTS' ESTATES; MORTGAGE, 3.

EXEMPTION.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CRIMINAL LAW, 1, 43;
EXECUTION, 1 to 5.

EXPERT AND OPINION EVIDENCE.

See WILL, 2, 7.

EX POST FACTO LAW.

See INTOXICATING LIQUOR, 10.

EXPRESS COMPANY.

See COMMON CARRIER.

FAMILY SETTLEMENT.

Decedent's Estate.—*Claims*.—*Payment by Devisees*.—*Extinguishment*.—Where one devisee, who holds enforceable claims against the testator's estate, enters into a contract with another devisee upon whose land the claims are a charge, in pursuance of which the latter pays to the former full consideration for the claims, the settlement is valid, in the absence of fraud or mistake, and the claims involved will be deemed extinguished. *Hayes v. Sykes, 180*

FOREIGN CORPORATION.

See CONSTITUTIONAL LAW, 10.

FORFEITURE.

See INSURANCE, 2.

FORFEITURE OF CHARTER.

See CORPORATION, 8, 9.

FORMER JEOPARDY.

See CRIMINAL LAW, 11, 12.

FRAUD.

See CHATTEL MORTGAGE; CONTRACT, 5 to 7; FRAUDULENT CONVEYANCE; INSOLVENT DEBTORS; PLEADING, 15 to 17; PROMISSORY NOTE, 5, 6.

FRAUDULENT CONVEYANCE.

See NEW TRIAL, 8; PLEADING, 15 to 17.

1. *Promissory Note.—Subjection of Property to Payment of.—When Action May be Maintained.*—Where the holders of a promissory note seek to subject to its payment lands and other property of the maker alleged to have been fraudulently conveyed, the action can not be maintained until the note becomes due. *Joseph v. Kronenberger, 495*
2. *Same.—Garnishment Proceeding.—Conveyance of Property to Defraud Creditors.—Valuable Consideration.—Collusion Between Parties.*—Where a person colludes with a debtor to defraud creditors, taking a conveyance of property for that purpose, but giving a valuable consideration therefor, and there is no money placed in the grantee's hands or under his control belonging to the debtor, and nothing owing from him to the debtor, a garnishment proceeding against the grantee can not be maintained. *Ib.*

FREE GRAVEL ROAD.

See GRAVEL ROAD.

GARNISHMENT.

See ATTACHMENT, 3; CRIMINAL LAW, 1, 43; FRAUDULENT CONVEYANCE.

1. *Attorney's Fees.*—Money paid by a debtor to his attorneys for services to be rendered by them in defending an action against him, is not subject to garnishment in a proceeding ancillary to the main action. *Boyd v. Brown, 393*
2. *Same.—Money Paid under Contract.*—Money paid by a debtor to another in pursuance of a contract whereby the latter undertakes to build a house upon land belonging to the debtor's wife, becomes the property of the contractor, and is not subject to garnishment at the suit of the debtor's creditors. *Ib.*

GRAND JURY.

See CRIMINAL LAW, 18, 35.

GRAVEL ROAD.

See APPEAL, 3; CORPORATION, 7 to 9.

1. *Contractor's Bond.—Mistake.*—Mistakes in a bond given pursuant to the statute to secure the performance of a contract for the construction of a free gravel road, may be corrected, under section 1221, R. S. 1881, so as to give the bond the effect intended by the law. *Hart v. State, ex rel., 33*
2. *Same.—Liability of Sureties.*—The obligors in a bond executed by a contractor to secure the construction of a free gravel road are not liable for debts incurred by the contractor in the prosecution of the

work, in the absence of a condition to that effect, unless a mistake is averred and proved. *Ib.*

3. *Same.—Sale of Claims.—Champerty.*—A sale of claims for work performed and materials furnished in the construction of a free gravel road is not champertous, but is authorized by the code, and the assignee becomes the real party in interest. *Ib.*

GUARDIAN AND WARD.

See ARBITRATION AND AWARD, 3.

1. *Mortgage.—Purchase of Mortgaged Land.—Conversion.—Action on Bond.*—Where a guardian, on his own account, purchases land upon which he holds a mortgage to secure a loan of his ward's money, and agrees, as the purchase-price, to pay the debt due to the ward, such debt, as between the vendor and the guardian, is paid, and an action therefor will lie upon the guardian's bond as for a conversion.
Hogshead v. State, ex rel., 327
2. *Same.—Satisfaction of Mortgage.—Priority of Liens.*—Where the guardian in such case, after taking a conveyance of the land, enters the trust mortgage satisfied, in order that he may negotiate a new mortgage loan upon the land, the ward is not bound to institute a proceeding to establish the priority of the trust mortgage as against the new mortgagee, but may sue upon the guardian's bond for conversion. *Ib.*

HIGHWAY.

See NEGLIGENCE.

1. *Change of Location.—Vacation.—Consolidation.—Petitioners Required.*—A proceeding for the change of a highway is properly brought, under section 5046, R. S. 1881, merely upon the petition of the persons through whose lands it runs, even though the change involves the vacation of the highway and its consolidation with another running upon a different line, but also upon the petitioners' lands, which latter highway it is asked may be widened. *Pattin v. Crenwell, 147*
2. *Road Districts.—Township Trustee May Reduce Number of.—Supervisor.*—Under the act of April 13th, 1885 (Acts of 1885, page 202), a township trustee may reduce the number of road districts in his township, if the public interests will be thereby subserved, even though by doing so a duly elected supervisor may be deprived of official responsibility. *Lyon v. Kee, 150*

HUSBAND AND WIFE.

See ACTION; CONTRACT, 5 to 7; INSURANCE, 7, 8; INTOXICATING LIQUOR, 3, 4, MARRIED WOMAN; MORTGAGE, 4 to 9.

IMPEACHMENT OF WITNESS.

See CRIMINAL LAW, 15; EVIDENCE, 2.

INDICTMENT.

See CRIMINAL LAW.

INFANT.

See CRIMINAL LAW, 3.

INJUNCTION.

See CONTRACT, 8 to 10; PLEADING, 19.

1. *Taxes.—Receipts for.—Transfer of to Bank.—Cash Credit.—Payment.—County Treasurer.—Assignment.—Lien.—Fraud.*—Where a county treasurer transfers to a bank receipts for taxes due from it, receiving credit therefor as for so much cash deposited, and checks against it, drawing the amount out of the bank, in the absence of fraud the transaction is consummated as if the bank had paid the taxes in cash and

received the money on deposit; and after an assignment by the bank, an injunction will lie to prevent the enforcement of the alleged lien for said taxes. *Wasson v. Lamb, 514*

2. *Specifications of Cause.—Must be Considered Separately.*—Where several specifications of cause for an injunction are assigned, they must be considered separately, and they can not aid each other.

Hill v. Probst, 528

3. *Same.—Railroad Aid Tax.—Election for.—Attempt to Set Aside.—What Must be Averred.*—In such a case a specification that an election to vote a railroad tax is void because of failure to give proper notice, without an allegation that the board of commissioners did not levy the tax sought to be enjoined, is demurrable. *Ib.*

INSANITY.

See CRIMINAL LAW, 40, 41; MARRIAGE; PLEADING, 16, 17; WILL, 2 to 11, 13.

INSOLVENT DEBTORS.

See CHATTEL MORTGAGE; EXECUTION, 1 to 5; FRAUDULENT CONVEYANCE; GARNISHMENT.

1. *Attorney for Assignee.—Borrowing Trust Funds.—Purchase of Claims.—Profits.*—Where the attorney for the assignee of insolvent debtors borrows trust funds from the assignee, and uses the money in purchasing claims against the debtors, which are afterwards filed against the estate and allowed by the assignee, he is bound to account to the estate for any profits realized by him in the transaction, although there may be no fraudulent purpose. *Manhattan, etc., Co. v. Dodge, 1*
2. *Same.—Replevin.—Value of Goods.—Judgment not Conclusive.*—Where some of the claims are purchased by the attorney from creditors who have brought an action to replevy goods sold to the insolvents, and he causes judgment to be entered in favor of the replevin plaintiffs, declaring that the goods are of the value stated in their affidavits, and then sells such goods at private sale on his own account, he is not concluded by the value as fixed by the judgment, but is only bound to account for the true value. *Ib.*
3. *Same.—Interest.—When Assignee Chargeable with.*—The assignee of insolvent debtors is chargeable with interest on the funds in his hands from the time when, by the exercise of diligence, he could have secured an order declaring a dividend. *Ib.*

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 37, 38; DAMAGES, 2, 3; RAILROAD, 9 to 11, 17; WILL, 13, 14.

1. *Special Verdict.*—Where a special verdict has been requested, it is not error to refuse to give a general instruction as to the law of the case. *Stayner v. Joyce, 39*
2. *Argument upon Legal Questions.—Discretion of Court.*—As the trial court has power to hear argument and authorities bearing upon legal questions involved in its instructions, its discretion in doing so must be harmfully abused in order to constitute available error. *Slater v. Hogan, 207*
3. *Same.—Supplying Omissions.*—A judgment will not be reversed on account of an instruction which is meaningless as it appears in the record, but which, upon supplying evidently omitted words, is correct as an abstract legal proposition. *Ib.*
4. *Refusal to Give.—Supreme Court.*—Where neither the evidence adduced

nor the instructions given by the court are in the record, a ruling refusing to give instructions asked will not be considered on appeal.

Clare v. McIntire, 262

5. *Relating to Evidence.—When Erroneous.*—It is only the duty of the court, in case of an instruction in regard to the evidence, to look into the record and determine whether there is any evidence to which the instruction is applicable, and if there is and the instruction is erroneous, and such as is liable to mislead the jury, the judgment must be reversed.

Durham v. Smith, 463

INSURANCE.

1. *Sale of Insured Property.—Assignment of Policy.*—Upon a sale and transfer of property covered by a policy of insurance, and an assignment of the policy to the purchaser, duly assented to by the insurance company, a new and original contract of indemnity arises between the company and the assignee, which the latter may enforce without regard to what may have occurred prior to the assignment.
Continental Ins. Co. v. Munns, 30
2. *Same.—Encumbrances.—Forfeiture by Assignor.—Rights of Assignee.*—Where the owner of insured property mortgages it, without notice to the insurer and in violation of a condition in the policy, after which he sells the property and assigns the policy to the purchaser, who obtains the assent of the insurer to the assignment, the latter at the time of giving its assent having no actual knowledge of the mortgage, the insurer can not set up the previous forfeiture by the assignor to defeat an action by the assignee.
Ib.
3. *Same.—Inquiry as to Encumbrances.*—An applicant for insurance is not bound, unless inquired of, to disclose whether or not the property insured is encumbered.
Ib.
4. *Action on Policy.—Pleading.—Property Insured.—Allegation of Ownership.*—A complaint on a policy of insurance containing a provision that "if the assured shall not be the sole and unconditional owner in fee of said property then this policy shall be void" is sufficient, in the absence of a motion to make more specific, if it avers generally that the plaintiff was the owner of the property insured.
Phoenix Insurance Co. v. Stark, 444
5. *Same.—Application.—Filing with Complaint.*—In an action on an insurance policy, it is not necessary to file with the complaint a copy of the application on which the policy was issued.
Ib.
6. *Same.—Agent.—Filing Application.—Scope of Authority.*—An agent of an insurance company authorized to solicit and take applications for insurance is acting within the scope of his authority in preparing such applications, and if in doing so he fraudulently inserts false answers to interrogatories, without the knowledge or fault of the applicant, the company, and not the insured, must suffer.
Ib.
7. *Husband and Wife.—Parties.—Complaint.—Wife's Interest in Policy.—Failure to Avert.*—A complaint by a husband and wife, in a joint action on an insurance policy, issued to the husband alone, which fails to aver that the wife ever acquired any interest in the policy, is bad for a failure to state facts sufficient to constitute a cause of action.
Traders Insurance Co. v. Newman, 554
8. *Same.—Separate Real Estate of Wife.—Husband has no Insurable Interest in.*—Sections 5116 and 5117, R. S. 1881, of the "Married Women's" Act, take away from the husband all right to the possession or control of the wife's separate estate. He has no present right of enjoyment, and no interest in the rents and profits of his wife's real estate. A policy of insurance secured thereon by the husband, who has no insurable interest therein, is unenforceable.
Ib.

INTEREST.

See INSOLVENT DEBTORS, 3; SCHOOL LANDS.

INTERLOCUTORY ORDER.

See APPEAL, 1 to 3, 5.

INTERROGATORIES TO JURY.

See NEW TRIAL, 5; VERDICT, 2 to 4.

1. *Definite Answer.—Refusal to Require.*—It is not error to refuse to require the jury to give a more definite answer to an interrogatory, where the answers to other interrogatories cover the subject.
Louisville, etc., R. W. Co., v. Kane, 140
2. *New Trial.—Assignment of Error.*—The refusal of the court to require a jury to answer an interrogatory more specifically may be assigned as a cause for a new trial, but it can not be independently assigned as error in the Supreme Court.
Slaser v. Hogan, 207
3. *Motion to Require Answers to be Made Certain.—Error in Overruling.*—Where, in an action to recover damages for negligence, defendant seeks to show contributory negligence on the part of the plaintiff, the jury having returned evasive and improper answers to interrogatories pertinent to the issue, it is error for the court to overrule a motion to require the jury to retire and make definite and certain the answers to the interrogatories.
Cleveland, etc., R. W. Co. v. Asbury, 289

INTERSTATE COMMERCE.

See CONSTITUTIONAL LAW, 9 to 13; NATURAL GAS.

INTOXICATING LIQUOR.

See CONSTITUTIONAL LAW, 1 to 8; CRIMINAL LAW, 5, 13, 14.

1. *License.—Notice of Application.—Place of Sale.—Insufficient Description.*—Where there is no street named Main street in a town, and where the only lots therein numbered twenty-three are lots twenty-three east and twenty-three west, both situate upon Michigan street, a notice of an intention to apply for license to retail intoxicating liquors which describes the location of the proposed place of sale as being upon lot twenty-three on Main street, does not comply with the statute (section 5314, R. S. 1881), and is bad when attacked by a remonstrance.
Barnard v. Graham, 135
2. *Unlawful Sale.—Civil Liability.*—Under section 5323, R. S. 1881, one who sells intoxicating liquors to another in violation of the liquor law, is liable personally, as well as upon his bond, to any one who has thereby sustained damage to person, property or means of support.
Beem v. Chestnut, 390
3. *Same.—Sale to Intoxicated Person.—Damages to Wife by Being Driven from Home.*—One who sells liquors to an intoxicated person, knowing his condition, is liable under section 5323, R. S. 1881, for damages sustained by the wife of the vendee by being driven from home into the cold by her husband, while crazed by the effect of the liquors so sold, whereby she is made sick and suffers pain, loss of time, and expense in being cured.
Ib.
4. *Same.—Character of Action.—Contributory Negligence.—Complaint.*—The action in such case is not predicated upon the negligence of the defendant, but upon an aggressive wrong, and the plaintiff is not required to aver that she was free from fault contributing to the injury sustained.
Ib.
5. *Sale of.—Board of County Commissioners.—License to Sell in Cities.—Section 5319, R. S. 1881, Construed.*—The Act of 1875 regulating the sale of intoxicating liquors, saving section 5317, as amended by the act of

1889, limiting the amount which cities may demand for license to sell intoxicating liquors, relates exclusively to licenses issued by the board of county commissioners, and therefore section 5319, R. S. 1881, providing that "No license herein provided shall be granted for a greater or less period than one year," applies only to licenses granted by the county board, and not to licenses granted by cities.

Moore v. City of Indianapolis, 483

6. *Same.—License.—Refusal to Apply for.—Illegal Sale.—Clerk's Fee.—Estoppel.*—One who refuses to apply for a license under the ordinance passed in pursuance of section 5317, R. S. 1881, as amended by Act of 1889, will be estopped to complain, while continuing to sell liquors in violation of the ordinance, that a section of the ordinance by providing for a clerk's fee of one dollar, in addition to the license fee, has exceeded the authority of the council. *Id.*
7. *Same.—License.—Revocation of.—Valuable Consideration.—Police Regulation.*—It is abundantly settled that a license, or permit, issued in pursuance of a mere police regulation has none of the elements of a contract, and that it may be changed, or entirely revoked, even though based upon a valuable consideration. It only forms a part of the internal police system of the State. *Id.*
8. *Same.—Police Powers.—Right to Exercise.—Abridgment of.—Public Welfare.*—A law regulating or authorizing municipal corporations to regulate and impose restrictions upon the sale of intoxicating liquors is an exercise of the police power of the State, and neither the State nor the municipality can, by any sort of contract, license, or permit, abdicate, embarrass, or bargain away its right to exercise the power in such a manner as it may thereafter deem the public welfare requires. *Id.*
9. *Same.—License not a Contract.—Vested Right.—Police Power.—Unexpired License.—Ordinance Increasing Fee for.—Validity of.*—A permit by the State to sell intoxicating liquors is but an exercise of its police power, in which no one can acquire a vested right or contractual interest, and is revocable by the Legislature at any time; and an ordinance in pursuance of a legislative act, which increases the fees for an unexpired license is a valid ordinance. *Id.*
10. *Same.—Ex Post Facto Law.—What Constitutes.*—A law is retrospective, retroactive, or *ex post facto*, which makes acts committed prior to its enactment criminal, or, as applied to past transactions, which creates a new duty or impairs vested property rights acquired under existing laws; therefore, an ordinance declaring that all sales of intoxicating liquors thereafter made by persons failing to comply with its provisions shall be unlawful, is not an *ex post facto* law. *Id.*

JUDGMENT.

See APPEAL; CHATTEL MORTGAGE, 1; JURISDICTION, 2; NEW TRIAL, 1, 2; PROMISSORY NOTE, 1; SHERIFF'S SALE, 1.

1. *Collateral Attack.*—A judgment is only subject to collateral attack when it is void. *Essig v. Lower*, 239
2. *Same.—Jurisdiction.—Notice by Publication.—Affidavit.—Sufficiency of.*—Where notice is given by publication, the judgment of the court that the publication and the affidavit upon which it is based are sufficient to give it jurisdiction is conclusive upon all the parties, as against a collateral attack. *Id.*
3. *Same.—Judgment before Notice is Completed.*—A judgment rendered upon notice by publication, before the notice has run the full period prescribed by the statute, is not void, although erroneous, and not subject to collateral attack. *Id.*

4. *Same.*—*Quieting Title.*—*Removal of Encumbrances.*—*Notice by Publication.*—Under section 318, R. S. 1881, a decree to quiet title to real estate and to remove therefrom apparent liens, may be rendered upon notice by publication. *Ib.*
5. *Review of.*—*For what Causes will Lie.*—A complaint to review a judgment, for error apparent on the record, will lie only for causes which would have been available on appeal. *Rigler v. Rigler, 431*
6. *Action to Recover.*—*When Maintainable.*—*Promissory Note.*—An action to recover a judgment in personam can not be maintained on a note till its maturity. *Joseph v. Kronenberger, 495*
7. *Upon Pre-existing Obligations.*—*Purchasers at Sheriff's Sale.*—*Judgment on Official Bond.*—*Nunc Pro Tunc Entry.*—*Suit to Quiet Title.*—A suit to quiet title can not be maintained by the purchasers of real estate at a sheriff's sale on executions issued upon judgments rendered on pre-existing obligations, against the purchasers of said real estate at a sheriff's sale upon a judgment rendered against the principal and his sureties on an official bond, the last named judgment having been at first incorrectly entered up, and a *nunc pro tunc* entry for its correction having been made subsequently to the acquirement of a judgment lien by the other purchasers. *Leonard v. Broughton, 536*
8. *Same.*—*Rights of Parties.*—*Nunc Pro Tunc Entry.*—*Effect of.*—Where judgments are entered upon pre-existing obligations, the rights of the parties are fixed prior to the rendition of the judgments, and if it does not appear that they were misled, or parted with anything of value, or acquired any rights during the interval between the date the judgment on the official bond should have been properly entered and the making of the *nunc pro tunc* entry, except the acquirement of a judgment lien, they are bound by the corrected judgment as of the date of the original entry. *Ib.*
9. *Same.*—*Nunc Pro Tunc Entry.*—*Who Bound by.*—*Rights of Parties.*—*How Determined.*—*Superior Equities.*—All persons are bound by the entry of a *nunc pro tunc* judgment, and their rights are to be determined as if said judgment had been at first entered and signed, unless they have some superior or intervening equities in their behalf. *Ib.*
10. *Same.*—*Judgment Creditor.*—*General Lien of.*—*What Equities Subject to.*—The general lien of a judgment creditor upon lands of his debtor is subject to all equities existing against the lands of the judgment debtor in favor of third parties at the time of the recovery of the judgment. *Ib.*
11. *Same.*—*Judgment Creditor.*—*Collection of Judgment.*—*Failure to Enforce.*—*Effect of.*—*Third Parties.*—A judgment creditor loses no rights by the mere failure to enforce the collection of his judgment, where the rights of third parties have not intervened, and he has no knowledge of their claims. *Ib.*
12. *Same.*—*Upon Official Bond.*—*Real Estate.*—*When Lien Upon.*—*Corrected Judgment.*—*Lien of.*—Judgments on bonds payable to the State bind the real estate of the debtor from the date of the commencement of the action. If, in such a case, the first judgment for any reason is not binding, and the action is pending until the same is corrected, the judgment lien would relate back to the date of the commencement of the action. *Ib.*

JUDICIAL NOTICE.

See REAL ESTATE, 1.

JUDICIAL SALE.

See CHATTEL MORTGAGE, 2; SHERIFF'S SALE.

JURISDICTION.

See ATTACHMENT, 1; DECEDENTS' ESTATES, 3; DRAINAGE, 9; JUDGMENT, 2 to 4; MUNICIPAL CORPORATION; SHERIFF'S SALE, 1.

1. *Extent of.—Tribunal.—Cases of a General Class.*—Where a tribunal has jurisdiction of a general class of cases, every case of that class is within the subject of the tribunal's jurisdiction. Any movement in a case belonging to a class over which the tribunal has authority is jurisdiction. *Allen v. Jones*, 47 Ind. 438, modified; *Naltner v. Blake*, 56 Ind. 127, distinguished. *Jackson v. Smith*, 520
2. *Same.—Of Subject and Person.—Void Judgment.—Statutory Requirements.—Non-Compliance with.—Effect of.*—Where it appears that a case is one of a general class over which the tribunal has jurisdiction, the judgment is not absolutely void if the particular subject was within the territorial jurisdiction of the court, and there was jurisdiction of the person, although the statutory requirements may not all have been complied with by the tribunal or its officers. *Id.*

JUROR.

See CRIMINAL LAW, 22.

JURY.

See CRIMINAL LAW, 11, 12, 42; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY.

LAW OF CASE.

See SUPREME COURT, 4.

LEGISLATIVE POWER.

See CONSTITUTIONAL LAW.

LICENSE.

See EASEMENT.

LICENSE TO SELL LIQUORS.

See CONSTITUTIONAL LAW, 1 to 8; INTOXICATING LIQUOR.

LIEN.

See EXECUTION; GUARDIAN AND WARD, 2; INJUNCTION, 1; JUDGMENT, 4, 7 to 12.

LIMITATION OF ACTIONS.

See DECEDENTS' ESTATES, 7; MORTGAGE, 9; NEGLIGENCE, 7; PROMISSORY NOTE, 4.

MALICIOUS TRESPASS.

See CRIMINAL LAW, 2.

MARRIAGE.

Presumption of Validity.—Presumption of Continued Insanity.—Where a man who has been adjudged of unsound mind afterwards marries a woman with whom he lives for more than thirty years in the relation of husband and wife, the presumption of continued insanity will not prevail as against the presumption in favor of the legality of the marriage. *Castor v. Davis*, 231

MARRIED WOMAN.

See INSURANCE, 7, 8; INTOXICATING LIQUOR, 2 to 4; MORTGAGE, 4.

1. *Contract of Suretyship.*—Where a married woman, as the agent of an implement company, contracts with the company to become responsible for the payment of all implements and machines sold by her, and in pursuance of the agreement guarantees the payment of a promis-

- sory note by written endorsement, such guaranty is a contract of suretyship, and under the provisions of section 5119, R. S. 1881, relating to married women, is void. *Nixon v. Whiteley, etc., Co., 360*
2. *Husband and Wife.*—*Estate by Entireties.*—*Void Mortgage.*—*Contract of Suretyship.*—Where husband and wife hold an estate by entireties through a conveyance made to them jointly, his note being accepted for the purchase-money, the debt is his, not hers, and a mortgage to secure the note executed by both is, under section 5119, R. S. 1881, void as against the wife. *Stewart v. Babbs, 568*
 3. *Same.*—*Mortgage.*—*Oral Negotiations and Stipulations.*—*Merger of.*—In an action to foreclose said mortgage, neither fraud nor mistake being alleged, all oral negotiations and stipulations are merged in the contract as reduced to writing in the execution of the deed, note, and mortgage. *Ib.*

MASTER AND SERVANT.

Negligence.—*Machinery.*—*Patent Defect.*—*Assumption of Risk.*—*Contributory Negligence.*—One who, being employed by another to assist in loading heavy timbers upon a car, can by looking see that the hooks attached to a crane used in the work are dulled and incapable of safely holding the timbers raised by it, but continues in the service without objection, will be deemed to have assumed the risk created by the defect, and can not recover for an injury resulting to him by reason thereof. *Rietman v. Stolle, 314*

MEASUREMENT OF DAMAGES.

See DAMAGES, 3.

MERGER.

See MARRIED WOMAN, 3.

MISTAKE.

See GRAVEL ROAD, 1; REAL ESTATE, ACTION TO RECOVER, 2.

MONEY HAD AND RECEIVED.

1. *Right of Action for.*—The right of action for money had and received is based upon the fact of the receipt of money, or its equivalent, by one from another, under such circumstances as that the law implies a promise to repay it. *Ashton v. Shepherd, 69*
2. *Same.*—*Action on Implied Promise.*—*Proof of Express Promise.*—*Variance.*—*Amendment of Complaint.*—Where the complaint is based upon an implied promise to repay money paid out by the plaintiff for the defendant's benefit, proof showing an express promise to repay is an immaterial variance, and the plaintiff may amend his complaint after trial to make it conform to the evidence. *Ib.*

MORTGAGE.

See CHATTEL MORTGAGE; CONTRACT, 2; GUARDIAN AND WARD, 1, 2; MARRIED WOMAN, 2, 3.

1. *Deed.*—*To Indemnify Surety.*—A deed executed by a judgment debtor to indemnify against loss one who has become liable as replevin bail is, in legal effect, a mortgage. *Ashton v. Shepherd, 69*
2. *Description.*—*Office of.*—The office of a description is not to identify land, but to furnish the means of identification, and where the description contained in a mortgage does this, it is not void. *Works v. State, ex rel., 119*
3. *Same.*—*School Fund Mortgage.*—*Foreclosure.*—*Party in Interest.*—*County Auditor.*—*Right to Testify where Heirs or Administrators are Parties.*—In a suit upon the relation of a county auditor to foreclose a school fund

mortgage executed during his term of office, the relator is not a party in interest within the meaning of the statute prohibiting parties from testifying as witnesses where heirs or administrators are parties. *Ib.*

4. *Married Woman.—Husband and Wife.—Tenants by Entireties.—Consideration.—Party in Interest.*—Mrs. L., her husband joining, conveyed real estate to H. and wife jointly. For \$1,000 of the purchase-money H. contracted to build for Mrs. L. a house. To secure the performance of the contract, H. and wife executed to Mrs. L. a mortgage upon the real estate. Afterwards H. entered into a contract with B., whereby the latter agreed to build the house for \$800. He did build it, and when it was completed there was due him \$145. The house was accepted by Mrs. L., and she released her mortgage. To secure B., H. and wife executed a note and mortgage on the same real estate, payable to Mrs. L., who did not know of the execution of the same until she was requested by B. to endorse them to him, which she did. In an action by B. to foreclose the mortgage,

Held, that such mortgage is upon a sufficient consideration, and is a valid and enforceable obligation as against both H. and his wife.

Held, also, that Mrs. L. has no interest in the note or mortgage, and that B. is entitled to recover thereon for his own benefit.

Barger v. Hoover, 193

5. *Foreclosure.—Res Adjudicata.*—Where a widow seeks to have her one-third interest in the realty of her deceased husband set off to her in severalty, or, failing in that, to be allowed to redeem from a mortgage executed by the husband before his death, the theory of the existence of the mortgage having been adopted, a judgment awarding the partition is not an adjudication of the right of the holders of the mortgage to foreclose.

Quick v. Brenner, 364

6. *Purchase-Money.—Non-Joinder of Wife.—Foreclosure.—Right of Redemption by Surviving Wife.*—Where a wife does not join in a purchase-money mortgage on real estate, and the mortgage is foreclosed, she not being made a party to the foreclosure proceeding, and the premises sold, the wife, upon the death of her husband, has the right to redeem from said sale. Until her husband's death she had no claim, legal or equitable, upon the land. Not having been made a party to the action, she was not affected by the decree of foreclosure.

Barr v. Vanalstine, 590

7. *Same.—Wife's Inchoate Interest.—Right of Redemption.*—Immediately upon the death of her husband, by virtue of section 2491, R. S. 1881, the title to one-third of the said real estate, the husband's estate being worth less than \$10,000, vested in the surviving wife, subject to the said mortgage indebtedness, and then, and not until then, her right to redeem came into existence. *Ib.*

8. *Same.—Mortgages in Possession.—Rents and Profits.—Improvements.—Surviving Wife.—What Charged with.*—The appellant in this case having bought the said real estate from the purchaser at the sheriff's sale, as against the surviving wife, occupies the position of a mortgagee in possession; he is chargeable with the rents and profits from the date of the death of the husband, and she is chargeable with the mortgage debt and interest thereon at six per cent. per annum, and likewise for taxes paid, together with the cost of improvements made by the appellant and his grantee. *Ib.*

9. *Same.—Action to Redeem.—Statute of Limitations.—Demand.—Tender.*—Section 294, R. S. 1881, governs the time within which the action to redeem must be brought, and the surviving wife had fifteen years from the death of her husband to institute her suit. She was not bound as a condition precedent to the bringing of the action to redeem to make a demand or a tender. *Ib.*

MUNICIPAL CORPORATION.

See CONSTITUTIONAL LAW, 1 to 8; DRAINAGE, 9 to 11; STREETS AND ALLEYS; TOWN.

Cities.—Common Council.—Jurisdiction.—Local Improvements.—In the matter of local improvements jurisdiction is conferred upon municipal corporations over the whole subject thereof, and the common councils of those corporations are invested with exclusive original jurisdiction.

Jackson v. Smith, 520

NATURAL GAS.

1. *Transportation of.—Interstate Commerce.—Constitutional and Unconstitutional Provisions.—Interblending of.*—The act of March 9th, 1889, Acts of 1889, p. 369, has for its object to prevent persons from conveying natural gas from this state into another state, with the imposition of penalties for so doing, and is unconstitutional, being legislation in reference to interstate commerce. The provision of the act as to the sinking of wells, is so bound up with the provisions designed to effect the principal object that separation can not be made, without completely destroying the statute, and substituting another for it by judicial construction. *State, ex rel., v. Indiana, etc., Co., 576*
2. *Same.—Commercial Commodity.—When it Becomes.*—Natural gas in the earth may not be a commercial commodity, but when brought to the surface and placed in pipes for transportation, it assumes that character as completely as coal on the cars, or petroleum in the tanks. *Ib.*

NEGLIGENCE.

See COMMON CARRIER; DAMAGES, 1, 2, 4, 5; INTERROGATORIES TO JURY MASTER AND SERVANT; RAILROAD.

1. *Bicycle.—Rights of Road.*—A bicycle is a vehicle, and is entitled to the rights of the road equally with a carriage or other vehicle. *Holland v. Bartch, 46*
2. *Same.—Frightened Horses.—Liability of Bicycle Rider.*—The riding of a bicycle in the center of a highway, at a speed of fifteen miles an hour, to within twenty-five feet of horses attached to a carriage going in the opposite direction, is not negligence, rendering the rider of the bicycle liable for injuries caused to the occupant of the carriage by the horses taking fright. *Ib.*
3. *Same.—What Necessary to Liability.*—To make the rider of a bicycle, who is proceeding along a public highway, liable for injuries caused by horses taking fright at his machine, which he propels at a speed of fifteen miles an hour until near the horses, it must be shown that the acts done by him were done at a time, or in a manner, or under circumstances, which showed a disregard for the rights of others. *Ib.*
4. *Same.—Complaint.—Motion to Make Specific.*—Where a complaint charges the defendant, in general terms, with negligence in riding a bicycle upon a public highway, whereby the plaintiff's horse was frightened and ran away, thereby injuring him, a motion to have it made more specific by stating the particular acts constituting the negligence of the defendant should be sustained. *Ib.*
5. *County.—Public Bridge.*—A county is not liable for an injury caused to a traveller by a bridge giving way, unless it appears that the county authorities failed to exercise ordinary care in constructing or maintaining the bridge. *Board, etc., v. Pearson, 426*
6. *Same.—Defective Construction of Bridge.—Safely Using.—Pleading.*—The fact that a bridge was safely used for thirteen years does not overcome a direct averment that it was negligently constructed of unsafe and unsuitable materials. *Ib.*

7. *Same.—Statute of Limitations.*—As the right of action does not accrue until the injury is received, the statute of limitations does not begin to run until then, although the defendant's negligence runs back many years prior thereto. *Ib.*
8. *Same.—Proximate Result of Negligence.—Pleading.*—Where the facts pleaded show that the plaintiff's injury was the proximate result of the defendant's negligence, this is sufficient without a direct averment to that effect. *Ib.*
9. *Same.—Negligent Construction of Bridge.—Notice.—Pleading.*—Where the complaint alleges that the defendant county negligently constructed the bridge, which caused the plaintiff's injury, of unsafe and unsuitable material, it is not necessary to aver that the defendant had notice of its unsafe condition. *Ib.*
10. *Same.—Repairs.—Employment of Incompetent Persons.*—Where a county knowingly employs incompetent persons to repair a bridge, and has knowledge that their work is so negligently and unskillfully done as to leave the bridge in an unsafe condition, it is liable for resulting injuries. *Ib.*

NEW TRIAL.

See EVIDENCE, 6; INTERROGATORIES TO JURY, 2; PRACTICE, 6; SPECIAL JUDGE; SUPREME COURT, 5; VERDICT, 3, 6, 10.

1. *Motion for.—Judgment before Disposed of.*—A motion for a new trial may be made at any time during the term at which the finding is announced, or on the first day of the succeeding term, where the finding is announced on the last day of a term, and a judgment rendered before such motion is disposed of is not final within the meaning of the statute regulating appeals. *Colchen v. Ninde, 88*
2. *Same.—Vacating Judgment.—Absence of Formal Order.*—Where a new trial is had and a new judgment is rendered, the effect is to vacate the previous judgment, although there may be no formal order setting it aside. *Ib.*
3. *Newly Discovered Evidence.—Change of Result.*—There is no available error in refusing a new trial on the ground of newly discovered evidence where the new evidence is not of such a character as would probably change the result on another trial. *Andis v. Richtle, 138*
4. *Same.—Amendment of Application.—Materiality of Evidence.*—While it seems that an application for a new trial may be amended at a subsequent term by inserting additional affidavits, a refusal to allow the amendment is only available where the new evidence is material. *Ib.*
5. *Inconsistency between Verdict and Interrogatories*—Inconsistency between the general verdict and the answers to interrogatories is not a cause for a new trial. *Louisville, etc., R. W. Co. v. Kane, 140*
6. *Actions on Contract.—Amount of Recovery.*—In actions upon contract, an assignment as a cause for a new trial that the damages assessed by the jury are excessive, does not call in question the amount of the verdict. *Hogshead v. State, ex rel., 327*
7. *Causes for.—Verdict.—Practice.*—Alleged error in refusing to send the jury back to further consider their verdict and in discharging them over objection, will not be considered on appeal, unless assigned as cause for a new trial in the motion therefor. *Louisville, etc., R. W. Co. v. Green, 367*
8. *As of Right.—Action to Set Aside Conveyance of Real Estate.—Judgment Lien.*—Where a creditor seeks to set aside a conveyance of real estate in order to subject it to a prior judgment lien, asserting that his debtor is the real owner, the title to the land having been fraudulently

taken in the name of another, the debtor is not as of right entitled to a new trial, the title to the land being involved only collaterally.

Laggett v. Hinkley, 387

NON-RESIDENT.

See JUDGMENT, 2 to 4.

NOTICE.

See DRAINAGE, 1 to 3; INJUNCTION, 3; INTOXICATING LIQUOR, 1; JUDGMENT, 2 to 4; NEGLIGENCE, 9, 10; PROMISSORY NOTE, 6; REAL ESTATE, 1.

NUNC PRO TUNC ENTRY.

See ARBITRATION AND AWARD, 1; BILL OF EXCEPTIONS, 4; JUDGMENT, 7 to 9.

OBSTRUCTION OF HIGHWAY.

See CRIMINAL LAW, 29 to 33.

OFFICE AND OFFICER.

1. *City Clerk.—Bond.—Condition to Account for Moneys.*—Section 3095, R. S. 1881, authorizes the bond of a city clerk to be conditioned for the payment of all moneys received by him according to law and the ordinances of the city. *Middleton v. State, ex rel., 166*
2. *Same.—Conversion.—Sureties.—Validity of Ordinance.—Estoppel to Deny.*—In an action upon the official bond of a city clerk to recover moneys collected by him pursuant to ordinances of the city, which it is alleged he failed to pay over and converted to his own use, in violation of the condition of his bond, the obligors are estopped to assert that the ordinances under which the clerk received the moneys, and which were in existence when the bond was executed, are void for the reason that under the statutes prescribing the duties of city officers all moneys belonging or due to the city must be paid to its treasurer. *Ib.*

OFFICIAL BOND.

See JUDGMENT, 7 to 12; OFFICE AND OFFICER; RECEIVER; TOWNSHIP TRUSTEE.

OPEN AND CLOSE.

See ARGUMENT OF COUNSEL.

OPPRESSIVE GARNISHMENT.

See CRIMINAL LAW, 1, 43.

ORDINANCE.

See OFFICE AND OFFICER.

PARTIES.

See ACTION; INSURANCE, 7, 8; MORTGAGE, 3, 4; REAL ESTATE, 4.
Contract.—Allegation of Non-Interest.—Where a complaint upon a contract alleges that one whose name appears therein, but who did not sign the writing, has no interest in it, such person is not a necessary party. *Harrisburg Car, etc., Co. v. Sloan, 156*

PARTITION.

See APPEAL, 5; DECEDENTS' ESTATES, 6, 8.

PARTNERSHIP.

See PLEADING, 4.

PAYMENT.

See INJUNCTION, 1.

PLEADING.

See CONTRACT, 1, 6, 9; CRIMINAL LAW; DAMAGES, 4; DECEDENTS' ESTATES, 1; DIVORCE; DRAINAGE; INJUNCTION, 2, 3; INSURANCE, 4, 5, 7; MONEY HAD AND RECEIVED, 2; NEGLIGENCE, 4, 6, 8, 9; PRACTICE; REAL ESTATE, ACTION TO RECOVER, 1, 3; SLANDER; SUPREME COURT, 1, 2, 4.

1. *Complaint to Recover Real Estate.—Damages.—Misjoinder.*—It is not a misjoinder to join in the same complaint a paragraph seeking to recover the possession of real estate with another claiming damages for its detention.
Langsdale v. Woolen, 16
2. *Same.—Misjoinder.—Question of, How Raised.*—The only way to raise the question of a misjoinder of causes of action is by demurrer, and it is not error for the lower court to overrule a motion to docket separately the different paragraphs of complaint, as independent actions, on the ground of misjoinder.
Ib.
3. *Amendment.—Chattel Mortgage.—Creditor's Bill.*—Where a complaint seeks to set aside chattel mortgages and subject the mortgaged property to sale to pay judgments held by the plaintiff against the mortgagor, an amendment to the effect that the mortgagor had been permitted to retain possession of the property and dispose of a part of the same, does not change the cause of action, and it is not error to allow such amendment to be made after the evidence is heard, in order to conform the complaint thereto.
Levy v. Chittenden, 37
4. *Allegation of Partners' Names.—Unnecessary when.—Allegation of Incorporation.*—Where the names of the plaintiffs are given in full in the title of a cause, in alleging that the plaintiffs are partners, it is sufficient to allege that fact without again giving their names; and, also, where the name of a defendant imports that it is a corporation, a specific allegation is unnecessary.
Adams Ex. Co. v. Harris, 73
5. *Complaint.—Defects Cured by Verdict.*—If a complaint states facts sufficient to bar another action for the same cause, it is sufficient after verdict to uphold the judgment, as the defects will be deemed cured.
Colchen v. Ninde, 88
6. *Same.—Striking Out.—Harmless Error.*—There is no available error in striking out a paragraph of answer where the facts averred therein are admissible in evidence under another paragraph which remains in the record.
Ib.
7. *General Denial.—Demurrer.*—The Supreme Court must decide a case upon the record as it comes to it, and where the record shows that the trial court sustained a demurrer to an answer of general denial, the error is available.
Powers v. Town of New Haven, 185
8. *Same.—Joint Answer.—Supreme Court.—Assignment of Error.*—Where an answer filed in the trial court is the joint answer of all the defendants to the action, infants as well as adults, it must be so considered on appeal, and a joint assignment of error upon a ruling thereon is proper.
Ib.
9. *Complaint upon Replevin and Appeal Bonds.*—For a complaint counting in separate paragraphs upon a replevin bond and upon an appeal bond, which is held to be good, see opinion.
Hartley v. Cole, 247
10. *Answer.—Demurrer.—Amendment.—Waiver.*—Where a demurrer has been sustained to a paragraph of answer, and another paragraph is subsequently filed setting up substantially the same defence, the latter will be deemed an amendment, superseding the original paragraph, and error in sustaining the demurrer is waived.
Hargrove v. John, 285

11. *Complaint.—Joint Action.—What Must be Shown.*—In a joint action based on section 2442, R. S. 1881, relating to the liability of heirs a complaint which fails to show a cause of action in favor of all the plaintiffs is bad. *Kelley v. Adams, 340*
12. *Supplemental Complaint.*—A supplemental complaint is not an independent pleading, but constitutes a part of the plaintiff's complaint, and as such is not separately demurrable. *Peters v. Banta, 416*
13. *Same.—Defects Cured by Verdict.*—Where the supplemental complaint and the original pleading together state facts sufficient to bar another action for the same cause, other defects, in the absence of a demurrer, will be cured by verdict. *Ib.*
14. *Complaint.—Evidence.—Demurrer.—Harmless Error.*—Where the same evidence can be introduced, and the same relief granted, under the second as under the first paragraph of complaint, there is no available error in sustaining a demurrer to the first paragraph, if the demurrer to the second is overruled. *City of Huntington v. Hawley, 502*
15. *Fraud, how Plead.*—*Presumption of Fraud.—How Created.*—Fraud can not be pleaded in general terms, but the facts or circumstances constituting the fraud must be averred. The presumption of fraud arises from facts or circumstances which tend to show bad faith, and which operate prejudicially on the rights of others. *Jackson v. Myers, 504*
16. *Complaint.—Fraudulent Conveyance.—Insane Grantor.—Who may Avoid Deed of.*—A complaint by a judgment creditor, seeking to set aside a fraudulent conveyance, solely on account of the mental incapacity of the grantor, does not aver a good cause of action. The deed of an insane person can only be avoided by the grantor or his privies in blood or estate. *Rollet v. Heiman, 511*
17. *Same.—Suit to Set Aside a Fraudulent Conveyance.—What Constitutes a Good Complaint.*—A complaint to set aside a fraudulent conveyance, alleging that the conveyance was accepted by the grantee with knowledge of the fraudulent purpose, and as a mere volunteer, who has paid no consideration, is a good complaint, notwithstanding an averment of the mental incapacity of the grantor. *Ib.*
18. *Same.—How Judged.—Isolated Averment.—Effect of.—Surplusage.*—A pleading is to be judged from its general scope and tenor. An isolated averment will not be permitted to control the general frame and tenor of the pleading. Such an averment must be treated as mere surplusage, and surplusage will not vitiate a pleading. *Ib.*
19. *Injunction Proceeding.—Complaint.—Demurrer.*—Where a demurrer is sustained to certain specifications in one paragraph of complaint for injunction and is overruled as to the same specifications in a subsequent paragraph, there is no available error. *Hill v. Probst, 523*

POLICE POWER.

See CONSTITUTIONAL LAW, 12; INTOXICATING LIQUOR, 7 to 10.

POOL TABLES.

See CRIMINAL LAW, 3.

PRACTICE.

See ACTION; APPEAL; ARGUMENT OF COUNSEL; BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW; DRAINAGE; EVIDENCE; INSTRUCTIONS TO JURY; INTERROGATORIES TO JURY; NEW TRIAL; PLEADING; SPECIAL FINDING; SUPREME COURT; VERDICT.

1. *Finding.—Power of Court to Change after Entering of Record.*—After a finding has been announced and entered of record the power of the

court over it is at an end, except that it may at any time before the close of the term at which judgment is rendered grant a new trial.

Levy v. Chillenden, 37

2. *Same.—Character of.—Harmless Modification.*—All findings, which are not technically special findings, are regarded as general findings; and where facts are stated, an erroneous modification thereof on the motion of a party is harmless. *Ib.*
3. *Arrest of Judgment.—Motion.—Time of Making.*—A motion in arrest of judgment may not be made after judgment is rendered. *Colchen v. Ninde, 38*
4. *Pleading.—Exception.*—An exception is necessary to present any question upon a ruling sustaining a demurrer to a pleading. *Wright v. Ball, 134*
5. *Misconduct of Counsel.—Argument.*—It is only where the court is called upon to correct the injury resulting from the misconduct of counsel during the trial and refuses to do so, whereupon an exception is reserved, that any question can be presented in relation thereto on appeal, unless the injured party moves to discharge the jury. *Slaser v. Hogan, 207*
6. *Motion to Strike Out Parts of Depositions.—Cause for New Trial.—Supreme Court.*—A ruling on a motion to strike out parts of depositions must be assigned as cause for a new trial in order to present any question on appeal. *Ohio and Mississippi R. W. Co. v. Judy, 397*
7. *Venire de Novo.—When Will not be Granted.*—A motion for a *venire de novo* will not lie if there is no such informality or uncertainty in the verdict as to prevent the court from rendering the proper judgment. *Peters v. Banta, 416*
8. *Pleading.—Harmless Error.*—There is no available error in sustaining a demurrer to a special paragraph of answer if the facts therein pleaded are admissible in evidence under the general denial. *Ib.*
9. *When will be Denied.*—Where the verdict is perfect on its face, and so fully finds the facts as to enable the court to pronounce judgment upon it, a motion for a *venire de novo* will be denied, although the verdict may not find upon all the issues. *Bosseker v. Cramer, 18 Ind. 44, has been overruled. Board, etc., v. Pearson, 426*
10. *Decree.—Proper Form of.*—For the proper form of decree in such a case, see the closing part of the opinion. *Barr v. Vanalstine, 590*
11. *Same.—Unavailable Error.*—Where an error has been made in a decree by which the appellant is not injured, but benefited, he can not complain thereof. *Ib.*

PREScription.

See EASEMENT.

PRESUMPTION.

See ATTACHMENT, 1; COMMON LAW; CONTRACT, 7; DECEDENTS' ESTATES, 3; EXECUTION, 4, 5; MARRIAGE; PLEADING, 15; RAILROAD, 3, 12.

PRINCIPAL AND AGENT.

See COMMON CARRIER, 3; EVIDENCE, 7; INSURANCE, 6; PROMISSORY NOTE, 7.

PRINCIPAL AND SURETY.

See GRAVEL ROAD, 1, 2; JUDGMENT, 7 to 12; MARRIED WOMAN; MORTGAGE, 1; OFFICE AND OFFICER, 2; RECEIVER.

PRIORITY OF LIENS.

See GUARDIAN AND WARD, 2.

PROMISSORY NOTE.

See ATTACHMENT, 3; EVIDENCE, 1, 7, 8; FRAUDULENT CONVEYANCE; JUDGMENT, 6; MARRIED WOMAN; SET OFF.

1. *Ownership.—Judgment.—Estoppel.*—Where one who has an interest in a promissory note is not a party to an action in which the ownership of the note is brought in question, the judgment rendered in that action does not affect his rights. *Proctor v. Cole, 102*
2. *Constructive Delivery.*—The acts of the maker of a promissory note which the law will construe as a delivery must be such as to evince an unmistakable intention to give the note effect and operation according to its terms, and to relinquish all power and control over it in favor of the obligee. *Purviance v. Jones, 162*
3. *Same.—What is not a Delivery.*—Upon being requested by his creditor to execute a mortgage to secure a debt, the debtor refused to do so, stating that he had signed a note for the amount and left it in a bank for the creditor's benefit. Upon the death of the debtor the note, duly signed, was found among his private papers. It is not stated in the special finding that the note was actually left with the bank at any time for the payee's benefit, or that it ever was under the control of the payee or of any person for his use.

Held, that a delivery is not shown.

Ib.

4. *Same.—Compelling Delivery.—Estoppel.—Statute of Limitations.*—Where one is induced to forego his purpose to secure his money before the statute of limitations has barred his claim, by the assurance of the debtor that a note has been signed and delivered to a bank for his benefit, he may, upon the death of the debtor with the note still in his possession, be entitled to compel a delivery, or to require it to be treated, in an equitable suit, as having been delivered as represented. *Ib.*

5. *Fraud.*—Where one is induced to sign a promissory note by a cunningly devised scheme, preconcerted for the purpose of deceiving him, and made effective by false statements, a conclusion of fraud is warranted. *Giberson v. Jolley, 301*

6. *Same.—Bona Fide Holder.—Notice of Fraud.—Burden of Proof.*—In an action by an endorsee upon a promissory note which was obtained from the maker by fraud, the burden is upon the plaintiff to show that he is a *bona fide* holder of the note, which includes proof that he acquired it without notice of the fraud. *Ib.*

7. *Payable in Bank.—Bank not the Agent of Payee.—Insolvency of Bank.*—Where the makers of a note made payable at a designated bank, on the date of its becoming due, pay to the bank both the principal and interest of the note, with the direction that it be applied to its payment, and the bank afterwards becomes insolvent, they are not discharged; for the designation of a bank as the place of payment does not authorize a deposit at the payee's risk, when, as under section 368, R. S. 1881, the payee is not bound to present the note for payment at the designated place to charge the maker, and the bank is not deemed the agent of the payee. *Glatt v. Fortman, 384*

8. *Esrow.—Delivery before Condition Performed.—Liability.*—One in whose hands a note has been placed by the maker to be delivered to the payee upon the performance of certain conditions by him, and who, in violation of his obligation, delivers the note to the payee before the performance of the conditions, is liable in damages to the maker, who has become responsible to the payee's endorsee, a *bona fide* holder. *Riggs v. Trees, 402*

PROSECUTING ATTORNEY.

See DIVORCE.

PUBLIC BRIDGE.

See NEGLIGENCE, 5 to 10.

PUBLIC IMPROVEMENTS.

See STREETS AND ALLEYS; TOWN.

QUIETING TITLE.

See DRAINAGE, 9, 10; JUDGMENT, 4, 7; REAL ESTATE, ACTION TO RECOVER, 2.

RAILROAD.

See DAMAGES, 7, 8; INJUNCTION, 3.

1. *Platform Between Stations.—Duty to Keep in Repair.—Liability for Negligence.*—Where two railroad companies use in common a platform extending from the station of one to that of the other, and over which their passengers may be expected to pass in going from one station to the other, they are bound to keep it in safe condition, and are both liable for injuries resulting to passengers from their failure to do so.
Lucas v. Pennsylvania Company, 205
2. *Highway Crossing.—Failure to Give Signals.—Liability for Animals Killed.*—The failure of the engineer to give the crossing signals required by statute (section 4020, R. S. 1881), will not entitle a party to recover for a cow killed by a passing train upon a highway crossing, although she escaped from a sufficient enclosure, without the fault of the plaintiff, who made diligent efforts to find her, unless the facts authorize the conclusion that the failure to give the signals caused the death of the animal. Such a conclusion is not justified on account of a failure to sound the whistle, if the other statutory signals are given.
Louisville, etc., R. W. Co. v. Green, 367
3. *Same.—Presumption that Signals were Given.—Special Verdict.*—If a special verdict is silent upon a material point, such point will be deemed as found against the party having the burden; so, where the verdict, while finding that the whistle was sounded, is silent with reference to the ringing of the bell, it will be deemed that the latter signal was given, the presumption being, in the absence of a showing to the contrary, that the engineer did his duty. *Ib.*
4. *Negligence.—Leaving Injured Passenger on Track.—Carrier's Duty of Protection.*—Where a passenger, by reason of the failure of the train employees to call the stations, attempts to alight at a station called by a fellow passenger, not his destination, and is thrown from the platform to the track by the sudden starting of the train, and afterwards, while upon the track between the station and his destination, in a partially unconscious condition from his fall, is negligently run down and killed by a passenger train in charge of employees having knowledge of his fall and condition of mind, the company is liable because of its duty, having knowledge of his fall and mental condition, to use care to protect him from its trains.
Cincinnati, etc., R. R. Co. v. Cooper, 469
5. *Same.—Running Trains.—Company Chargeable with Knowledge of.—Liability.*—In such a case the company is chargeable with knowledge of the running of trains upon its road, and to render the company liable it is sufficient that the accident, without being foreseen, was such as might naturally result. *Ib.*
6. *Same.—Injured Passenger.—Not a Trespasser.*—Where a passenger injured by a fall from a train, and in a dazed state, is knowingly left

- by the carrier upon the track, he will not be regarded as a trespasser. *Ib.*
7. *Same.—Injured Passenger.—Carrier's Wrongful Act.—Proximate Cause of Death.*—The wrongful act of the carrier in leaving its injured passenger on the track exposed to great and known peril, without mind enough to care for himself, was the proximate cause of his death. *Ib.*
 8. *Same.—Injury to Passenger while Intoxicated.—Company's Fault.—Liability.*—Where a passenger is injured while intoxicated, the injury being due, not to his intoxication, but to the carrier's wrongful act, the carrier will not be relieved of liability. *Ib.*
 9. *Same.—Instruction to Jury.—Wilfulness.—What Necessary to Sustain Charge of.*—An instruction to the jury that to establish the charge of wilfulness "an actual intent to do the particular injury alleged need not be shown," but that "misconduct of defendant's servants, such as to evince an utter disregard of consequences, so as to inflict the injury complained of, may of itself tend to establish wilfulness," is not erroneous. *Ib.*
 10. *Same.—Instruction Relating to Intoxicated Passenger.—Failure to Repeat.*—Where the jury is strongly instructed once that if the intestate's presence on the track and his injury were due to his intoxication, there could be no recovery, a failure to repeat the instruction is not just cause of complaint. *Ib.*
 11. *Same.—Carrier's Negligence at Station.—Instruction Upon.*—In the trial court's instruction there was no error in charging the jury that if the intestate's condition and injury were caused by the defendant's negligence at the station, the plaintiff was entitled to recover. *Ib.*
 12. *Tax in Aid of.—Tax Duplicate.—Entry upon.—Presumption.—County Commissioners.—Validity of Election.—Collateral Attack.*—The appearance of a railroad aid tax upon the tax duplicate creates the presumption that it was levied by the board of commissioners. The validity of the election authorizing it is necessarily reviewed in making the levy, and can not be attacked in an injunction proceeding. *Hull v. Probst, 528*
 13. *Same.—County Commissioners' Record.—Petition for Tax.—Absence of Formal Order.—Tax List Entry.—Effect of.*—Where the proceedings of the board of commissioners contain no formal order granting the prayer of a petition for a railroad aid tax, an entry of the tax in the tax list of the township petitioning for it is sufficient to show that it was assessed. *Ib.*
 14. *Freight Train.—Injury to Passenger.—Refusal to Leave Platform.—Assumption of Risk.*—A passenger who remains on the platform of a car at the rear end of a long freight train, after a request or order from the employees of the railroad to enter the car, voluntarily occupies a place of danger, and assumes the risk of being thrown from the car and injured by the sudden jerk of the train on being put in motion. *Louisville and Nashville R. R. Co. v. Bisch, 549*
 15. *Same.—Mode of Travel Adopted.—Risks Incident to.—Passenger's Assumption of.*—Passengers assume the risks incident to the means of transportation adopted, and one who takes passage on a freight train, although with a caboose attached, must take notice of the character of the train and use such ordinary care to avoid injury as the nature of the mode of travel will admit; one of the risks to be guarded against being that arising from the sudden jerk of the train on starting, due to the taking up of slack between the cars. *Ib.*
 16. *Same.—Direction of Company's Employees.—Passenger's Observance of.—Re-*

sulting Injury.—Carriers' Liability.—A passenger is justified, as a general rule, in obeying the directions of the employees of the carrier, and if he receives injury in obeying them, the carrier is liable, even if it appears that if the passenger had not obeyed he would have escaped injury. *Ib.*

17. *Same.—Instruction.—Carrier's Liability.—Erroneous Statement of.*—An instruction which states in substance that notwithstanding the warning given to the passenger, and his disobedience of the same, he would be entitled to recover, if the conductor of the train, at the moment of giving the signal to start, saw the passenger in a position which the conductor knew to be dangerous, and without giving him a reasonable time to enter the car, and by a sudden jerk in starting the cars the passenger was injured, is erroneous. *Ib.*

RAPE.

See CRIMINAL LAW, 8 to 10.

REAL ESTATE.

See CONTRACT, 3 to 7; DECEDENTS' ESTATES; DEED; DRAINAGE; EASEMENT; INSURANCE; MORTGAGE; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE; WIDOW; WILL.

1. *Description.—Judicial Notice.*—Judicial notice is taken that land in this State described as "the east half of the southeast quarter of section 22, township 23 north, range 10 east," is not a fractional eighty-acre tract of land. *Peck v. Sims, 345*
2. *Same.—Indefinite Description.—Void Sale.*—A sale of real estate by the following description, viz., "the fractional east half of the southeast quarter of section 22, township 23, range 10 east, containing sixty-one acres more or less, in Blackford county, Indiana," is void, the description being too indefinite to furnish the means of identifying the land. *Ib.*
3. *Same.—Deed to Land Adversely Held.—Action to Recover.—Statute Construed.*—Section 1073, R. S. 1881, providing that any person having a right to recover possession of or quiet title to real estate in the name of another, shall have a right to sue in his own name, gives validity to deeds which prior to its passage were void as against a third person in possession. *Ib.*
4. *Same.—Real Party in Interest.*—Under sections 1073 and 251, R. S. 1881, construed together, one who has conveyed land adversely occupied by another can not maintain an action in his own name to recover possession for the benefit of his grantee, but such action must be brought in the name of such grantee, who is the real party in interest. *Ib.*

REAL ESTATE, ACTION TO RECOVER.

See PLEADING, 1, 2; REAL ESTATE, 3, 4.

1. *Defendant Admits Possession by Pleading.*—Where, in an action to recover possession of real estate, the defendant appears and files a general denial, he thereby admits that he has possession of the entire tract in controversy. *Caspar v. Jamison, 58*
2. *Same.—Conflicting Descriptions.—Which is Controlling.—Quieting Title.—Survey.—Monuments.—Showing Location by Parol.*—In an action to quiet title, the court, in pursuance of a survey made by its order, found that the plaintiff was the owner of, and gave judgment quieting title to, one hundred and fifty acres of land, to be taken off the south side of a certain fractional section in a given township and range, its full length from east to west, and wide enough north and south to include one hundred and fifty acres; this description was followed by courses and distances purporting to describe said one hundred and

- fifty acres, but in fact describing less than half that quantity of land. In an action by the same plaintiff against the same defendants to recover possession of the land,
- Held*, that as the description first given is complete and reliable, and describes the quantity of land which the plaintiff was adjudged to own, it controls the subsequent description by courses and distances.
- Held*, also, that for the purpose of showing a mistake in the latter description, parol evidence was admissible to show the location of the stakes planted by the surveyor, where they can not be found. *Ib.*
3. *Complaint.—Conclusions of Law.—Variance.*—Where a complaint to recover real estate alleges that the plaintiff is the owner in fee, and that fact is stated in the special finding, and a proper judgment is rendered, the fact that the conclusions of law characterize the plaintiff's title merely as "good and sufficient," is not material.
Sprung v. Moore, 352
4. *Same.—Swamp Land.—Meander Line.—Riparian Owner.*—Where one, by a chain of conveyances running back to the United States, acquires title to "that part of the northeast fractional quarter of section 36, township 23 north, range 4 west, lying south of the Kankakee river," being swamp land, the meander line of the river does not constitute the boundary of his land, but he is a riparian owner, and may maintain an action of ejectment against one who, without his consent, has taken possession of the land lying between such meander line and the river. *Ib.*
5. *Pending Appeal.*—In an action to recover possession of real estate the fact that an appeal has been taken from the judgment which constitutes the foundation of the plaintiff's title, is no defence.
Peters v. Banta, 416

RECEIVER.

1. *Official Bond Executed by Debtor.—Receiver May not Enforce.*—The receiver of an insolvent debtor has no right of action to enforce the collection of the penalty of an official bond executed by the debtor and his sureties.
State, ex rel., v. Sullivan, 197
2. *Same.—Sureties on Debtor's Official Bond.—Not Affected by Decree Appointing Receiver.*—The sureties on an official bond executed by an insolvent debtor are not concluded by a decree appointing a receiver, in a proceeding to which they are not parties, from resisting the enforcement of the bond against them at the suit of the receiver. *Ib.*

REDEMPTION FROM SALE.

See MORTGAGE, 6 to 9.

REFUNDING RECEIPT.

See DECEDENTS' ESTATES, 5.

REMEDIES.

See BENEFIT SOCIETY; BILL OF EXCEPTIONS, 4; CONTINUANCE; EXECUTION, 6, 7; VERDICT, 6.

RENTS AND PROFITS.

See MORTGAGE, 8.

REPEAL OF STATUTE.

See CRIMINAL LAW, 24.

REPLEVIN.

See INSOLVENT DEBTORS, 2.

1. *Replevin Bond.—Technical Defects.—Estoppel.*—The obligors in a replevin bond, under which the possession of the property in controversy has

been obtained, are estopped, in an action on the bond for a failure to comply with an adverse judgment of the court, to set up as a defence that the statutory provisions relating to the execution of the bond were not technically complied with. *Hartley v. Cole, 247*

2. *Same.—Acceptance and Approval of Bond.*—Where a replevin bond is delivered to the sheriff, and he, acting upon such delivery, places the property in the possession of the principal obligor, this constitutes an acceptance and approval of the bond. *Ib.*
3. *Same.—Action upon Bond.—Subsequent Issuing of Execution.*—In an action upon a replevin bond, the fact that the plaintiff, after the beginning of the action, causes an execution to be issued upon the judgment rendered in the replevin proceeding, and also upon the judgment under which the property was seized prior to the institution of the replevin proceeding by the defendant, does not constitute a defence. *Ib.*

REPLEVIN BOND.

See PLEADING, 9; REPLEVIN.

RESCISSION OF CONTRACT.

See CONTRACT, 2 to 4.

RES JUDICATA.

See MORTGAGE, 5.

RESTRAINT OF TRADE.

See CONTRACT, 8.

REVIEW OF JUDGMENT.

See JUDGMENT, 5.

RIGHTS OF ROAD.

See NEGLIGENCE, 1 to 4.

RIPARIAN OWNER.

See REAL ESTATE, ACTION TO RECOVER, 4.

ROAD DISTRICTS.

See HIGHWAY.

SALE.

See CHATTEL MORTGAGE, 2; DECEDENTS' ESTATES, 7, 8; DRAINAGE, 10; EXECUTION; INSURANCE; INTOXICATING LIQUOR; REAL ESTATE; SCHOOL LANDS; SHERIFF'S SALE.

1. *Warranty.—Damages.—Tender.*—In an action for a breach of warranty it is not necessary to tender the thing bought back to the seller, but the buyer may retain it and sue for damages. *Harrisburg Car, etc., Co. v. Sloan, 156*
2. *Same.—Trial by Jury.*—An action for damages for a breach of warranty is not of right triable by the court, and a jury may be called. *Ib.*

SCHOOL FUND.

See COMMON SCHOOL FUND.

SCHOOL FUND MORTGAGE.

See MORTGAGE, 2.

SCHOOL LANDS.

Proceeds of Sale.—Deferred Payments.—Liability of County for Interest.—Under section 4346, R. S. 1881, which provides that the deferred payments, as well as the one-fourth of the purchase-money to be paid in

advance on lands set apart to the school fund by act of Congress and sold by authority of the Legislature, "shall be regarded as part of the congressional school fund," the county is chargeable with interest on the entire amount of the price of the land, and the default of a purchaser of the land in paying deferred instalments, and the consequent forfeiture of the land to the school fund, does not relieve the county of liability for interest on the full amount.

Board, etc., v. State, ex rel., 442

SET-OFF.

1. *Mutuality.—Promissory Note.*—Mutuality is essential to the validity of a set-off, and a defendant can not use a promissory note in which a third person has an interest as a set-off against a claim asserted by the plaintiff. *Proctor v. Cole, 102*
2. *Same.—Evidence.*—Where a defendant offers a promissory note as a set-off, the contract under which he claims to be the owner thereof is admissible in evidence to show that he has not such an interest in the note as entitles him to use it as a set-off. *Ib.*

SETTLEMENT.

See FAMILY SETTLEMENT.

SHERIFF.

See EXECUTION, 1 to 5.

SHERIFF'S SALE.

See JUDGMENT, 6, 7.

1. *Real Estate.—Title to.—Circuit Court.—Judgment of.*—The judgment of the circuit court showing jurisdiction of the person and subject-matter, and valid on its face, is *prima facie* sufficient to support a sheriff's sale and title to real estate claimed under it. *Langedale v. Woollen, 16*
2. *Issuing of Execution.—Finding as to.*—Where it is found that a sheriff advertised property for sale, had it appraised, sold it, executed a certificate of purchase, made a proper return of the order of sale and executed a deed to the purchaser, it will be deemed that an execution was properly issued, without any express finding to that effect. *Peters v. Banta, 416*

SHORT-HAND REPORTER.

See SUPREME COURT, 7.

SIDEWALKS.

See TOWN.

SLANDER.

Complaint.—Sufficiency of.—A complaint for slander alleged that the defendant spoke of and concerning the plaintiff that he "took and drove off his (meaning defendant's) ducks and sold them, and that if he (meaning plaintiff) was so mean as to drive his (meaning defendant's) ducks off and sell them, he could have them," which charge it is alleged was false.

Held, that the words alleged to have been spoken are not actionable *per se*, and that in the absence of an averment of extrinsic facts giving them a criminal meaning, the complaint is bad, even after verdict.

Harrison v. Manship, 43

SPECIAL FINDING.

See TRIAL.

Time of Requesting.—Discretion of Court.—If the request for a special finding is not made at the commencement of the trial, the right thereto is

waived, and thereafter it is a matter within the sound discretion of the court whether or not it will make a special finding.

Hartlep v. Cole, 247

SPECIAL JUDGE.

Power of.—Final Disposition of Cause.—Where a cause is tried before a special judge, and a verdict returned on the last day of the term of court, such special judge has authority to hear a motion for a new trial filed on the first day of the next term, and to make a final disposition of the cause.

Slaser v. Hogan, 207

SPECIAL VERDICT.

See INSTRUCTIONS TO JURY, 1; RAILROAD, 3; VERDICT.

SPECIFIC PERFORMANCE.

See CONTRACT, 5 to 7.

STATUTE.

See CONSTITUTIONAL LAW, 1 to 8, 13.

STATUTE CONSTRUED.

See CHANGE OF VENUE; COMMON SCHOOL FUND; CONSTITUTIONAL LAW, 1 to 8; CRIMINAL LAW, 3, 23; EXECUTION, 6, 7; INTOXICATING LIQUOR, 5; REAL ESTATE, 3, 4; SCHOOL LANDS.

STATUTE OF FRAUDS.

See CONTRACT, 5 to 7.

STATUTE OF LIMITATIONS.

See DECEDENTS' ESTATES, 7; MORTGAGE, 9; NEGLIGENCE, 7; PROMISSORY NOTE, 4.

STOCK AND STOCKHOLDER.

See CORPORATION, 1 to 6.

STREETS AND ALLEYS.

See TOWN.

1. *Laying Out or Altering.—Reference to City Commissioners.—Assessment of Damages and Benefits.*—Under sections 3166 and 3167, R. S. 1881, when a city undertakes to lay out a new street or alley, or to alter an existing one, it must refer the matter to the city commissioners provided for therein, for the assessment of the benefits and damages accruing to property owners from such improvement. *City of Anderson v. Bain, 254*
2. *Same.—Failure to Refer to City Commissioners.—Liability of City.*—Where a city undertakes to widen an alley into a street without referring the matter to the city commissioners for the assessment of benefits and damages, thus depriving a property owner of the right to have his damages assessed in the manner prescribed by the statute, it is liable to such person for the damages which were assessable by the commissioners. *Ib.*
3. *Same.—What Damages Assessable by City Commissioners.*—The city commissioners may assess damages accruing from the laying out or the altering of a street, but they have no power to assess damages resulting from the manner in which the street may afterwards be graded, or otherwise improved, and for damages of the latter kind the city does not become liable on account of its failure to refer the matter of the improvement to the city commissioners. *Ib.*
4. *Same.—Grading of Street.—When Lot Owner Entitled to Damages.*—An abutting lot owner is not entitled to recover damages resulting from the original grading of a street, but to entitle him to damages on ac-

count of the grading of a street he must show that there was a prior established grade, and that the damages for which he sues were caused by a change therein. *Ib.*

SUBSCRIPTION FOR STOCK.

See CORPORATION, 1 to 6.

SUPERVISOR OF HIGHWAY.

See HIGHWAY.

SUPREME COURT.

See ACTION; APPEAL; BILL OF EXCEPTIONS, 3; DAMAGES, 6; EVIDENCE, 10, 12; INSTRUCTIONS TO JURY, 3 to 5; PLEADING, 8.

1. *Error in Overruling Demurrer for Misjoinder.*—Judgment not Reversed for. The Supreme Court will not reverse a judgment for error committed in sustaining or overruling a demurrer for misjoinder of causes of action. *Langsdale v. Woolen, 16*
2. *Complaint.*—Assignment of Error Upon.—It can not be assigned as error that a particular paragraph of a complaint does not state facts sufficient to constitute a cause of action; the complaint can only be questioned in such way as an entirety. *Ashton v. Shepherd, 69*
3. *Questions Relating to Evidence.*—When not Presented.—In the absence of a bill of exceptions, no question is presented upon the admission of evidence, or as to whether the evidence supports the finding. *Prickman v. Mendenhall, 279*
4. *Law of Case.*—Complaint.—The decision of the Supreme Court on a former appeal remains the law of the case through all of its subsequent stages, and a complaint once held good can not thereafter be questioned. *Mason v. Burk, 404*
5. *Same.*—Reversal of Judgment.—New Trial as to Whole Case.—Where a judgment is reversed on appeal, with directions to grant a new trial as to the whole case, the granting of a new trial operates upon all the parties to the record. *Ib.*
6. *Assignment of Error.*—Must be Specific.—Under section 655, R. S. 1881, an assignment of error must be specific and definite in its terms; hence an assignment that "the court erred in sustaining the demurrer to the sixth paragraph of the defendant's answer" only calls in question the sufficiency of such paragraph of answer, and the sufficiency of the complaint will not be examined or passed upon. *Peters v. Banta, 416*
7. *Bill of Exceptions.*—Certificate of Official Reporter.—Where a bill of exceptions is complete and technically correct without the certificate of the person professing to have acted as official reporter at the trial, there being nothing elsewhere in the record to indicate his official character, the certificate will not be accepted as a verity to set aside the bill of exceptions. *L'Honniedieu v. Cincinnati, etc., R. W. Co., 435*
8. *Same.*—Testimony.—Manner of Objection for Appeal.—General Objection Insufficient.—That an objection to offered testimony may be considered in the Supreme Court, it must recite with particularity wherein the testimony is objectionable, a general objection that the testimony is irrelevant, incompetent and immaterial being insufficient. *Ib.*
9. *Reversal of Judgment.*—Weight of Evidence.—Where there is evidence tending to support the finding of the court, the Supreme Court will not reverse a judgment on the weight of the evidence. *City of Huntington v. Hawley, 502*

SURETY.

See GRAVEL ROAD, 1, 2; JUDGMENT, 7 to 12; MARRIED WOMAN; MORTGAGE, 1; OFFICE AND OFFICER, 2; RECEIVER.

SURVEY.

See REAL ESTATE, ACTION TO RECOVER, 2.

SWAMP LAND.

See REAL ESTATE, ACTION TO RECOVER, 4.

TAXES.

See EVIDENCE, 15; INJUNCTION; RAILROAD, 12, 13.

TAX RECEIPTS.

See BANKS AND BANKING, 1; INJUNCTION, 1.

TENANTS BY ENTIRETIES.

See MARRIED WOMAN, 2, 3.

TENDER.

See DRAINAGE, 10; MORTGAGE, 9; SALE.

TIME.

See CRIMINAL LAW, 7.

TOWN.

1. *Sidewalks.—Power to Compel Building of.*—Under the statutes in force in 1875, the board of trustees of an incorporated town had power to compel the grading and building of sidewalks, whenever, in their opinion, the public convenience required it, and if lot-owners refused to do the work, to let a contract for the improvement, pay the cost out of the treasury and collect the same from such lot-owners by suit.
Powers v. Town of New Haven, 185

2. *Same.—Authority to Make Improvement.—Estoppel of Property-Owner.*—If the owner of property in a town stands by, and, without objecting, permits improvements to be made which benefit his property, he is estopped to afterwards deny the authority of the town to make the improvements.
Ib.

TOWNSHIP TRUSTEE.

See HIGHWAY.

Certificate of Allowance - Assignment.—Individual Act.—Liability on Bond.—The act of a township trustee in assigning a certificate of allowance for services, and afterwards procuring a duplicate certificate and taking credit therefor in his settlement with the county commissioners, is an individual act, and creates no liability in favor of the assignee on the trustee's official bond.
State, ex rel., v. Keifer, 113

TRESPASS.

See CRIMINAL LAW, 2, 25 to 27; RAILROAD, 6.

TRIAL.

See ARGUMENT OF COUNSEL; SALE, 2; SPECIAL JUDGE.

Finding by Jury.—When Deemed General.—Where the court, of its own motion and for its information, calls a jury to find as to the facts, the finding will be deemed a general, and not a special finding.
Prilliman v. Mendenhall, 279

TRIAL BY JURY.

See SALE, 2.

TRUST AND TRUSTEE.

See INSOLVENT DEBTORS; WILL, 12.

1. *Testamentary Appointment of Trustee, without Bond.—Power of Court to Require Bond.*—Where a testator by his will appoints his son trustee of an express trust thereby created, and provides that he shall not be required to give bond, but that for any breach of trust he may be removed and another appointed by the court, the court has no power to require the trustee so appointed by the testator to execute a bond for the faithful discharge of his duties. *Ex Parte Kilgore, 94*
2. *Same.—Trustee with an Interest.—Removal.—Right to be Heard.*—Where a will provides that the testator's son shall have and hold in trust for his children "one full and equal fourth part of my property, real and personal, with the right to use any income or rents thereof to aid in raising and educating his children," the court has no power to arbitrarily remove such trustee, without petition or notice, and without giving him an opportunity to be heard. *Ib.*

TURNPIKE.

See GRAVEL ROAD.

TURNPIKE COMPANY.

See CORPORATION, 7 to 9.

VARIANCE.

See CRIMINAL LAW, 17; MONEY HAD AND RECEIVED, 2; REAL ESTATE, ACTION TO RECOVER, 3.

VENDOR AND PURCHASER.

See DEED; FRAUDULENT CONVEYANCE; GUARDIAN AND WARD; MORTGAGE, 8; VENDOR AND PURCHASER.

VENIRE DE NOVO.

See PRACTICE, 7, 9; VERDICT, 5, 6, 9.

VENIRE.

See CHANGE OF VENUE.

VERDICT.

See CRIMINAL LAW, 20; DAMAGES, 8; NEW TRIAL, 5, 7; PLEADING, 5, 13; PRACTICE, 7, 9.

1. *Special.—Must be Requested.*—Where a party submits to the court the form of a special verdict and asks that it be placed before the jury, but does not request that a special verdict be returned, the court does not err in refusing to submit the paper to the jury. *Louisville, etc., R. W. Co. v. Kane, 140*
2. *Support of Evidence.—Answers to Interrogatories.*—Answers of the jury to interrogatories can not be used to determine whether the verdict is supported by the evidence, where the evidence is not in the record. *Ib.*
3. *Support of Evidence.—Interrogatories.*—If a general verdict is supported by the evidence, a motion for a new trial, assigning as a reason that it is not so supported, should be overruled, without regard to the manner in which interrogatories are answered. *Staser v. Hogan, 207*
4. *Same.—Answers to Interrogatories.*—Where there is nothing in the record to show that the verdict is not based upon the charge which the evidence tends to support, it is wholly immaterial whether or not the answers to interrogatories addressed to another branch of the case are supported by the evidence. *Ib.*
5. *Special.—Venire de Novo.*—If a special verdict, stripped of improper

matter, is sufficient to support a judgment under the issues made by the pleadings, a motion for a *venire de novo* should be overruled.

Louisville, etc., R. W. Co. v. Green, 367

6. *Same.—Material Defects.—Remedy.*—If a special verdict fails to find facts established by the evidence, or finds facts not established thereby, the remedy is by a motion for a new trial, and not by a motion for a *venire de novo*. *Ib.*
7. *Same.—Motion for Judgment on.—Separate Causes of Action.*—Where the plaintiff seeks a recovery upon distinct causes of action, set up in separate paragraphs, in case a special verdict is returned, a motion by the defendant for judgment in his favor as to one cause of action should be sustained, if the facts found entitle him to judgment. *Ib.*
8. *When Court May Direct for Defendant.*—Where there is no evidence to support a verdict in favor of the plaintiff, the court may properly direct the jury to return a verdict for the defendant. *Boyd v. Brown, 393*
9. *Motion to Set Aside.—Venire de Novo.—Appeal.*—In the absence of a motion to set aside a verdict, or a demand for a *venire de novo*, a finding of the court so defective as not to justify the court in rendering judgment upon it can not be corrected by appeal. *Bohr v. Neuenschwander, 449*
10. *Same.—Motion for New Trial.—Defective Verdict.*—A motion for a new trial does not reach a defect in the form of the verdict. *Ib.*

VESTED RIGHT.

See INTOXICATING LIQUOR, 9.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; INJUNCTION, 1; INSOLVENT DEBTORS.

WAIVER.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; COMMON CARRIER, 2; CRIMINAL LAW, 36; PLEADING, 10; SPECIAL FINDING.

WARRANTY.

See SALE.

WAYS.

See EASEMENT; HIGHWAY; STREETS AND ALLEYS.

WET LANDS.

See DRAINAGE.

WIDOW.

See MORTGAGE, 5 to 9; WILL, 12.

1. *Will.—Election.—Statutory Requirements.*—Where a widow dies within a year after the death of her husband, without having made an election in writing, signed, acknowledged, and filed with the clerk as provided by the statute (Elliott's Suppl., section 428), as to whether she would take under her late husband's will or under the law, she will be deemed to have taken under the will, notwithstanding the fact that she, being ignorant of the statutory requirement, had in fact determined to take under the law, and in pursuance of that determination had taken actual possession of one-third of the land left by her husband. *Fosher v. Williams, 172*
2. *Right to Elect is Personal.—Death before Election.*—The right to elect is strictly personal and can be exercised only by the widow, and

if she dies before the time for election has expired, the right expires with her, in the absence of a statute authorizing its exercise afterwards by her heirs or representatives. *Ib.*

WILL.

See TRUST AND TRUSTEE; WIDOW.

1. *Real Estate.—Charge upon for Payment of Debts.—Personal Liability of Devises.*—Where a will provides that real estate devised to the testator's wife and mother shall be held liable, in equal portions, to pay his debts if his personalty is not sufficient for that purpose, "and to this end I make a charge upon my estate so devised to perform the same," the devisees do not, by accepting the testamentary provision, become personally liable for the indebtedness of the estate.
Hayes v. Sykes, 180
2. *Contest of.—Witness.—Competency.—Opinion.*—In a proceeding to contest a will, the heirs and devisees are competent witnesses as to the mental condition of the testator, and, not being experts, such witnesses must state the facts upon which they base their opinions, including the conduct of the testator, what he said, and, perhaps, a full history of his life.
Slaser v. Hogan, 207
3. *Same.—Mental Incapacity.—Undue Influence.—Evidence.—Views of Testator as to Making Wills.*—In a proceeding to contest a will on the grounds of mental incapacity and undue influence, a conversation between the testator and another in relation to the former's views upon the subject of making wills, in which he spoke strongly against giving one child a larger share of the estate than another, is competent.
Ib.
4. *Same.—Mental Condition.—Cross-Examination.*—A witness having testified as to the physical and mental condition of the testator during the last year of his life, a question on cross-examination as to whether the witness would, during that period, have taken a note from the testator, and whether he ever heard anybody question his sanity, is not competent.
Ib.
5. *Same.—Domestic Relations of Testator.*—Where it is sought to set aside a will on the grounds of insanity and undue influence, it is competent to show the relations existing between the testator and his family, as to whether they were friendly or otherwise.
Ib.
6. *Same.—Condition of Testator's Mind.—Scope of Inquiry.*—To enable the jury to determine as to the condition of the testator's mind at the date of the will, it is proper to show its condition at any time prior thereto.
Ib.
7. *Same.—Opinion of Witness.*—The testator having been a lawyer, and having conducted the trial of a cause before a justice of the peace a short time prior to his death, the justice might properly detail the facts as to the manner in which the testator conducted the trial, but his mere opinion that he managed the cause "well and shrewdly" is not competent.
Ib.
8. *Same.—Impeachment of Witness.*—Where a witness, upon facts stated by him, gives his opinion that the testator was of sound mind, it is proper to show, by way of impeachment, that he had stated out of court that the testator was childish, and that he was going crazy.
Ib.
9. *Same.—Contradiction as to Collateral Matter.—Interest and Hostility of Witness.*—The general rule that where a witness is cross-examined on matters collateral to the issues, his answers can not be contradicted by the party putting the questions, has no application where it is sought to show that the witness has an interest in the case, or that he is hostile to one of the parties to the action.
Ib.

10. *Same.—Verdict.—Support of Evidence.*—Where a complaint to contest a will charges both mental incapacity and undue influence, a general verdict setting aside the will, will withstand an attack upon the ground that it is not supported by the evidence, if there is evidence tending to support one of the charges made by the complaint. *Ib.*
11. *Same.—Instruction to Find for the Defendant.*—Where, in a proceeding to contest a will, there is some evidence tending to support the charge of undue influence, it is proper to refuse to instruct the jury that they should find for the defendants on that issue on the ground that there is no such evidence. *Ib.*
12. *Widow.—Life Estate.—Limited Power of Disposition.—Trust Estate.—Accounting Among Heirs.—Descent.*—A testator devised all of his real and personal property to his wife for life, with remainder over to his children, share and share alike. The widow was given power, as executrix, to sell any or all of the property to pay debts or to make advancements, and it was provided that whatever of the estate remained in her hands at her death should be equally divided among the testator's children, taking advancements into consideration. The widow sold part of the estate and loaned of the proceeds a large sum to two of the sons, they agreeing to account to the other children at her death. These sons also came into possession of other property belonging to the estate. The widow died, never having qualified as executrix, and no letters of administration were ever issued on the testator's estate.
- Held*, that as the widow had a power of disposition only for defined purposes and as executrix, the part of the estate which was not applied to such purposes, constituted, aside from rents and profits and interest and income, a trust fund for the benefit of all the children, and an action will lie by the other children against the sons to enforce an accounting.
- Held*, also, it appearing that there are no debts, that the account between the heirs may be adjusted by a court of equity without the intervention of an administrator.
- Held*, also, that as, by the terms of the will, the children were given the same interest in the testator's property that they would have taken without the will, they are considered as taking by descent. *Robertson v. Robertson, 333*
13. *Capacity of Testatrix.—Instruction to Jury.*—An instruction to the jury that a person of unsound mind, all mental defects being included in the word "unsound," is incapable of making a valid will, whether or not such unsoundness affected the disposition of the property, is erroneous. *Durham v. Smith, 463*
14. *Witnesses.—Credibility of.—Instruction to Jury.*—Where a jury is charged that witnesses residing near the testatrix, being more intimate with her, and having better opportunities of observation than those living farther away, other things being equal, are entitled to greater credit, the instruction is erroneous, as an invasion of the province of the jury. *Ib.*

WITNESS.

See CRIMINAL LAW, 15; EVIDENCE, 2, 5, 6, 9; MORTGAGE, 3; WILL, 2, 7 to 9.

WORDS AND PHRASES.

See CHANGE OF VENUE; COMMON SCHOOL FUND; CRIMINAL LAW, 1, 14, 26, 43.

9
END OF VOLUME 120.

E. J. M.



